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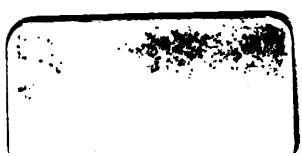

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COMMENTARIES

ON THE

Laws of England,

IN FOUR BOOKS.

BY

Sir WILLIAM BLACKSTONE, Knt.
ONE OF THE JUSTICES OF HIS MAJESTY'S
COURT OF COMMON PLEAS.

THE THIRTEENTH EDITION,
WITH THE LAST CORRECTIONS OF THE AUTHOR;
AND WITH NOTES AND ADDITIONS
By EDWARD CHRISTIAN, Esq.
BARRISTER AT LAW,
AND PROFESSOR OF THE LAWS OF ENGLAND
IN THE UNIVERSITY OF CAMBRIDGE.

LONDON:
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FOR T. CADELL JUN. AND W. DAVIES IN THE STRAND.
1800.

B-7

TO

The Queen's Moſt Excellent Majeſty,

THE FOLLOWING VIEW

OF THE LAWS AND CONSTITUTION

OF ENGLAND,

THE IMPROVEMENT AND PROTECTION OF WHICH

HAVE DISTINGUISHED THE REIGN

OF HER MAJESTY'S ROYAL CONSORT,

IS,

WITH ALL GRATITUDE AND HUMILITY,

MOST RESPECTFULLY INSCRIBED

BY HER DUTIFUL

AND MOST OBEDIENT

SERVANT,

WILLIAM BLACKSTONE.

PREFACE.

THE following ſheets contain the ſubſtance of a courſe of lectures on the laws of England, which were read by the author in the univerſity of OXFORD. *His original plan took its riſe in the year* 1753: *and, notwithſtanding the novelty of ſuch an attempt in this age and country, and the prejudices uſually conceived againſt any innovations in the eſtabliſhed mode of education, he had the ſatisfaction to find (and he acknowleges it with a mixture of pride and gratitude) that his endeavours were encouraged and patronized by thoſe, both in the univerſity and out of it, whoſe good opinion and eſteem he was principally deſirous to obtain.*

The death of Mr. VINER *in* 1756, *and his ample benefaction to the univerſity for promoting the ſtudy of the law, produced about two years afterwards a regular and public eſtabliſhment of what the author had privately undertaken. The knowlege of our laws and conſtitution was adopted as a liberal ſcience by general academical autho-*

rity; competent endowments were decreed for the ſupport of a lecturer, and the perpetual encouragement of ſtudents; and the compiler of the enſuing commentaries had the honour to be elected the firſt Vinerian profeſſor.

In this ſituation he was led, both by duty and inclination, to inveſtigate the elements of the law, and the grounds of our civil polity, with greater aſſiduity and attention than many have thought it neceſſary to do. And yet all, who of late years have attended the public adminiſtration of juſtice, muſt be ſenſible that a maſterly acquaintance with the general ſpirit of laws and the principles of univerſal juriſprudence, combined with an accurate knowlege of our own municipal conſtitutions, their original, reaſon, and hiſtory, hath given a beauty and energy to many modern judicial deciſions, with which our anceſtors were wholly unacquainted. If, in the purſuit of theſe inquiries, the author hath been able to rectify any errors which either himſelf or others may have heretofore imbibed, his pains will be ſufficiently anſwered: and, if in ſome points he is ſtill miſtaken, the candid and judicious reader will make due allowances for the difficulties of a ſearch ſo new, ſo extenſive, and ſo laborious.

2 Nov. 1765.

POSTSCRIPT.

NOTWITHSTANDING the diffidence expreſſed in the foregoing Preface, no ſooner was the work completed, but many of its poſitions were vehemently attacked by zealots of all (even oppoſite) denominations, religious as well as civil; by ſome with a greater, by others with a leſs degree of acrimony. To ſuch of theſe animadverters as have fallen within the author's notice (for he doubts not but ſome have eſcaped it) he owes at leaſt this obligation; that they have occaſioned him from time to time to reviſe his work, in reſpect to the particulars objected to; to retract or expunge from it what appeared to be really erroneous; to amend or ſupply it when inaccurate or defective; to illuſtrate and explain it when obſcure. But, where he thought the objections ill-founded, he hath left and ſhall leave the book to defend itſelf: being fully of opinion, that if his principles be falſe and his doctrines unwarrantable, no apology from himſelf can make them right; if founded in truth and rectitude, no cenſure from others can make them wrong.

ADVERTISEMENT

TO

THIS EDITION.

THE diſcharge of a duty ſimilar to that to which the world is indebted for the Commentaries on the Laws of England, led the Editor to preſume, that in the courſe of his reſearches he might be able to collect ſome obſervations which might be uſeful to the Public, and at the ſame time it ſuggeſted the propriety of his endeavouring to contribute to the further improvement of that valuable production.

The extenſive ſale of the laſt Edition has abundantly proved that the deſign has met with general approbation.

No alteration has been made in the Author's text; but the principal changes, which either the legiſlature or the deciſions of the courts have introduced into the law ſince the laſt corrections of the Author, are ſpecified and explained by the Editor in the notes*.

The Commentaries on the Laws of England form an eſſential part of every Gentleman's library: the beautiful and lucid arrangement, the purity of the language, the claſſic elegance of the quotations and

* The Editor's notes are ſeparated from the text and notes of the Author by a line, and are referred to by figures, thus (1), and the pages of the former editions are preſerved in the margin.

alluſions,

alluſions, the clear and intelligible explanation of every ſubject, muſt always yield the reader as much pleaſure as improvement; and wherever any conſtitutional or legal queſtion is agitated, they are the firſt, and, in general, the beſt authority referred to. In order to add to their utility in this reſpect, the Editor has annexed ſuch exceptions and particular inſtances as he thought would render the information ſtill fuller and more complete. Where he has preſumed to queſtion any of the learned Commentator's doctrines, he has aſſigned his reaſons for his doubt or diſſent; but where he has diſcovered an inaccuracy ariſing merely from inadvertence, he has ſtated it without ſcruple or ceremony. We ſhould expect more than human excellence, if we imagined that a work, comprizing almoſt the whole ſyſtem of Engliſh juriſprudence, could be entirely free from miſtakes. But it is a matter of great concern to the Profeſſion and to the Public at large, that in an Author ſo univerſally read, ſo deſervedly admired, and in whom ſuch confidence is repoſed, every ſubject ſhould be reviewed with ſcrupulous and critical preciſion. It has been, and it will continue to be, the Editor's peculiar ſtudy and ambition to advance this learned performance to as great a degree of accuracy and perfection as his attention and ability can effect; and he will always be grateful for any correction of his own errors, or for any uſeful remarks which may not have occurred to him in his examination of the Commentaries.

The Editor, or perhaps he ſhould rather call himſelf the Annotator, thinks it neceſſary to obſerve that the publication of the laſt Edition was accompanied with circumſtances which expoſed him to a degree of cenſure, though on his part perfectly unmerited; for it will ſcarcely be imputed to him as blame that he ſhould have aſſigned his Notes to the proprietors of the work in the ſame unlimited manner in which Sir William Blackſtone had conveyed the text. Thoſe circumſtances he neither foreſaw, nor could prevent. He holds himſelf reſponſible for the utility and accuracy of the notes in every edition to which his name is prefixed; but with regard to every other circumſtance attending the publication he has no direction or control.

Though the notes in this edition have been conſiderably extended, yet there are many important ſubjects which the author has either entirely omitted, or too concifely touched upon, the Editor is therefore preparing to publiſh ſeparately ſuch additions as theſe deficiencies in the Commentaries ſeem to require.

The profeſſional reader ought to be apprized that the Editor in the Notes has frequently referred to annotators and the authors of Law Treatiſes in preference to original caſes, thoſe learned writers in the places cited having generally collected all the original authorities which would be too numerous to be introduced into a note to the Commentaries.

LINCOLN'S INN,
January 20, 1800.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FIRST.

INTRODUCTION.

OF THE

STUDY, NATURE, AND EXTENT

OF THE

LAWS OF ENGLAND.

INTRODUCTION.

SECTION THE FIRST.

ON THE STUDY OF THE LAW*.

MR. VICE-CHANCELLOR, AND GENTLEMEN OF THE UNIVERSITY,

THE general expectation of ſo numerous and reſpectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, muſt unavoidably be productive of great diffidence and apprehenſions in him who has the honour to be placed in it. He muſt be ſenſible how much will depend upon his conduct in the infancy of a ſtudy, which is now firſt adopted by public academical authority; which has generally been reputed (however unjuſtly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate ſhare of cultivation. He cannot but reflect that, if either his plan of inſtruction be crude and injudicious, or the execution of it lame and ſuperficial, it will caſt a damp upon the farther progreſs of this moſt uſeful and moſt rational branch of learning; and may defeat for a time

* Read in Oxford at the opening of the Vinerian lectures; 25 Oct. 1758.

gentleman and ſcholar; an highly uſeful, I had almoſt ſaid eſſential, part of liberal and polite education. And in this I am warranted by the example of antient Rome; where, as Cicero informs us [a], the very boys were obliged to learn the twelve tables by heart, as a *carmen neceſſarium* or indiſpenſable leſſon, to imprint on their tender minds an early knowledge of the laws and conſtitution of their country.

BUT as the long and univerſal neglect of this ſtudy, with us in England, ſeems in ſome degree to call in queſtion the truth of this evident poſition, it ſhall therefore be the buſineſs of this introductory diſcourſe, in the firſt place to demonſtrate the utility of ſome general acquaintance with the municipal law of the land, by pointing out its particular uſes in all conſiderable ſituations of life. Some conjectures will then be offered with regard to the cauſes of neglecting this uſeful ſtudy: to which will be ſubjoined a few reflections on the peculiar propriety of reviving it in our own univerſities.

AND, firſt, to demonſtrate the utility of ſome acquaintance with the laws of the land, let us only reflect a moment on the ſingular frame and polity of that land, which is governed by this ſyſtem of laws. A land, perhaps the only one in the univerſe, in which political or civil liberty is the very end and ſcope of the conſtitution [b]. This liberty, rightly underſtood, conſiſts in the power (1) of doing whatever the laws permit [c]; which is only to be effected by a general conformity of all orders and degrees to thoſe equitable rules of action, by which the meaneſt individual is protected from the inſults and oppreſſion of the greateſt. As therefore every ſubject is intereſted in the preſervation of the laws, it is incumbent

[a] *De Legg.* a. 23.

[b] Monteſq. *Eſp. L. l.* 11. *c.* 5.

[c] *Facultas ejus, quod cuique facere libet, niſi quid vi, aut jure prohibetur. Inſt.* 1. 3. 1.

(1) See the Editor's reaſons for his diſapprobation of this definition of liberty in the note to p. 126.

upon

upon every man to be acquainted with thoſe at leaſt, with which he is immediately concerned; leſt he incur the cenſure, as well as inconvenience, of living in ſociety without knowing the obligations which it lays him under. And thus much may ſuffice for perſons of inferior condition, who have [7] neither time nor capacity to enlarge their views beyond that contracted ſphere in which they are appointed to move. But thoſe, on whom nature and fortune have beſtowed more abilities and greater leiſure, cannot be ſo eaſily excuſed. Theſe advantages are given them, not for the benefit of themſelves only, but alſo of the public: and yet they cannot, in any ſcene of life, diſcharge properly their duty either to the public or themſelves, without ſome degree of knowledge in the laws. To evince this the more clearly, it may not be amiſs to deſcend to a few particulars.

LET us therefore begin with our gentlemen of independent eſtates and fortune, the moſt uſeful as well as conſiderable body of men in the nation; whom even to ſuppoſe ignorant in this branch of learning is treated by Mr. Locke [d] as a ſtrange abſurdity. It is their landed property, with its long and voluminous train of deſcents and conveyances, ſettlements, entails, and incumbrances, that forms the moſt intricate and moſt extenſive object of legal knowledge. The thorough comprehenſion of theſe, in all their minute diſtinctions, is perhaps too laborious a taſk for any but a lawyer by profeſſion: yet ſtill the underſtanding of a few leading principles, relating to eſtates and conveyancing, may form ſome check and guard upon a gentleman's inferior agents, and preſerve him at leaſt from very groſs and notorious impoſition.

AGAIN, the policy of all laws has made ſome forms neceſſary in the wording of laſt wills and teſtaments, and more with regard to their atteſtation. An ignorance in theſe muſt always be of dangerous conſequence, to ſuch as by choice or

[d] Education, § 187.

neceſſity compile their own teſtaments without any technical aſſiſtance. Thoſe who have attended the courts of juſtice are the beſt witneſſes of the confuſion and diſtreſſes that are hereby occaſioned in families; and of the difficulties that ariſe in diſcerning the true meaning of the teſtator, or ſometimes in diſcovering any meaning at all: ſo that in the end his eſtate
[8] may often be veſted quite contrary to theſe his enigmatical intentions, becauſe perhaps he has omitted one or two formal words, which are neceſſary to aſcertain the ſenſe with indiſputable legal preciſion, or has executed his will in the preſence of fewer witneſſes than the law requires.

BUT to proceed from private concerns to thoſe of a more public conſideration. All gentlemen of fortune are, in conſequence of their property, liable to be called upon to eſtabliſh the rights, to eſtimate the injuries, to weigh the accuſations, and ſometimes to diſpoſe of the lives of their fellow-ſubjects, by ſerving upon juries. In this ſituation they have frequently a right to decide, and that upon their oaths, queſtions of nice importance, in the ſolution of which ſome legal ſkill is requiſite; eſpecially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our beſt juries, to do this with any tolerable propriety, has greatly debaſed their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverſe their verdicts, than perhaps the conſtitution intended.

BUT it is not as a juror only that the Engliſh gentleman is called upon to determine queſtions of right, and diſtribute juſtice to his fellow-ſubjects: it is principally with this order of men that the commiſſion of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by puniſhing the diſſolute and idle; by protecting the peaceable and induſtrious; and, above all, by healing petty differences and preventing vexatious proſecutions. But, in order to attain theſe deſirable ends, it is neceſſary that the magiſtrate

ſhould

ſhould underſtand his buſineſs; and have not only the will, but the power alſo, (under which muſt be included the knowledge,) of adminiſtering legal and effectual juſtice. Elſe, when he has miſtaken his authority, through paſſion, through ignorance, or abſurdity, he will be the object of contempt [9] from his inferiors, and of cenſure from thoſe to whom he is accountable for his conduct.

YET farther; moſt gentlemen of conſiderable property, at ſome period or other in their lives, are ambitious of repreſenting their country in parliament: and thoſe, who are ambitious of receiving ſo high a truſt, would alſo do well to remember its nature and importance. They are not thus honourably diſtinguiſhed from the reſt of their fellow-ſubjects, merely that they may privilege their perſons, their eſtates, or their domeſtics; that they may liſt under party banners; may grant or withhold ſupplies; may vote with or vote againſt a popular or unpopular adminiſtration; but upon conſiderations far more intereſting and important. They are the guardians of the Engliſh conſtitution; the makers, repealers, and interpreters of the Engliſh laws; delegated to watch, to check, and to avert every dangerous innovation, to propoſe, to adopt, and to cheriſh any ſolid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to tranſmit that conſtitution and thoſe laws to their poſterity, amended if poſſible, at leaſt without any derogation. And how unbecoming muſt it appear in a member of the legiſlature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a ſtranger to the text upon which he comments!

INDEED it is perfectly amazing that there ſhould be no other ſtate of life, no other occupation, art, or ſcience, in which ſome method of inſtruction is not looked upon as requiſite, except only the ſcience of legiſlation, the nobleſt and moſt difficult of any. Apprenticeſhips are held neceſſary to almoſt every art, commercial or mechanical: a long courſe

of reading and ſtudy muſt form the divine, the phyſician, and the practical profeſſor of the laws: but every man of ſuperior fortune thinks himſelf *born* a legiſlator. Yet Tully
[10] was of a different opinion; "it is neceſſary (ſays he[e]) for a "ſenator to be thoroughly acquainted with the conſtitution; "and this (he declares) is a knowledge of the moſt extenſive "nature; a matter of ſcience, of diligence, of reflection; "without which no ſenator can poſſibly be fit for his "office."

THE miſchiefs that have ariſen to the public from inconſiderate alterations in our laws, are too obvious to be called in queſtion; and how far they have been owing to the defective education of our ſenators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which raſh and unexperienced workmen have ventured to new-dreſs and refine, with all the rage of modern improvement. Hence frequently its ſymmetry has been deſtroyed, its proportions diſtorted, and its majeſtic ſimplicity exchanged for ſpecious embelliſhments and fantaſtic novelties. For, to ſay the truth, almoſt all the perplexed queſtions, almoſt all the niceties, intricacies, and delays, (which have ſometimes diſgraced the Engliſh, as well as other courts of juſtice,) owe their original not to the common law itſelf, but to innovations that have been made in it by acts of parliament; "overladen (as ſir Ed-"ward Coke expreſſes it[f]) with proviſoes and additions, and "many times on a ſudden penned or corrected by men of "none, or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two queſtions made upon rights merely depending upon the common law; and warmly laments the confuſion introduced by ill-judging and unlearned legiſlators. "But "if," he ſubjoins, "acts of parliament were after the old "faſhion penned, by ſuch only as perfectly knew what the

[e] *De Legg.* 3. 18. *Eſt ſenatori neceſſarium nôſſe rempublicam; idque late patet;—genus hoc omne ſcientiae, diligentiae memoriae eſt; ſine quo paratus eſſe ſenator nullo pacto poteſt.*

[f] 2 Rep. pref.

"common

" common law was before the making of any act of parlia-
" ment concerning that matter, as also how far forth former
" statutes had provided remedy for former mischiefs, and
" defects discovered by experience; then should very few
" questions in law arise, and the learned should not so often [11]
" and so much perplex their heads to make atonement and
" peace, by construction of law, between insensible and dis-
" agreeing words, sentences, and provisoes, as they now do."
And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk; unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

WHAT is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

SHOULD a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who

employ him. And yet the conſequence of his ignorance is comparatively very trifling and ſmall: his judgment may be examined, and his errors rectified by other courts. But how much more ſerious and affecting is the caſe of a ſupe-
[12] rior judge, if without any ſkill in the laws he will boldly venture to decide a queſtion upon which the welfare and ſubſiſtence of whole families may depend! where the chance of his judging right or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the moſt alarming nature, an injury without poſſibility of redreſs.

YET, vaſt as this truſt is, it can no where be ſo properly repoſed, as in the noble hands where our excellent conſtitution has placed it: and therefore placed it, becauſe, from the independence of their fortune and the dignity of their ſtation, they are preſumed to employ that leiſure which is the conſequence of both, in attaining a more extenſive knowledge of the laws than perſons of inferior rank; and becauſe the founders of our polity relied upon that delicacy of ſentiment, ſo peculiar to noble birth; which, as on the one hand it will prevent either intereſt or affection from interfering in queſtions of right, ſo on the other it will bind a peer in honour, an obligation which the law eſteems equal to another's oath, to be maſter of thoſe points upon which it is his birth-right to decide.

THE Roman pandects will furniſh us with a piece of hiſtory not unapplicable to our preſent purpoſe. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occaſion to take the opinion of Quintus Mutius Scaevola, the then oracle of the Roman law; but, for want of ſome knowledge in that ſcience, could not ſo much as underſtand even the technical terms, which his friend was obliged to make uſe of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof[s], "that "it was a ſhame for a patrician, a nobleman, and an orator

[s] *Ff.* 1. 2. 2. § 43. *Turpe eſſe patricio, et nobili, et cauſas oranti, jus in quo verſaretur ignorare.*

"of

" of cauſes, to be ignorant of that law in which he was ſo " peculiarly concerned." This reproach made ſo deep an impreſſion on Sulpicius, that he immediately applied himſelf to the ſtudy of the law; wherein he arrived to that profi- [13] ciency, that he left behind him about an hundred and four-ſcore volumes of his own compiling upon the ſubject; and became, in the opinion of Cicero[h], a much more complete lawyer than even Mutius Scaevola himſelf.

I WOULD not be thought to recommend to our Engliſh nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, ſuſtained likewiſe that of an excellent orator, a firm patriot, and a wiſe indefatigable ſenator: but the inference which ariſes from the ſtory is this, that ignorance of the laws of the land hath ever been eſteemed diſhonourable in thoſe, who are entruſted by their country to maintain, to adminiſter, and to amend them.

BUT ſurely there is little occaſion to enforce this argument any farther to perſons of rank and diſtinction, if we of this place may be allowed to form a general judgment from thoſe who are under our inſpection: happy that while we lay down the rule, we can alſo produce the example. You will therefore permit your profeſſor to indulge both a public and private ſatisfaction, by bearing this open teſtimony; that, in the infancy of theſe ſtudies among us, they were favoured with the moſt diligent attendance, and purſued with the moſt unwearied application, by thoſe of the nobleſt birth and moſt ample patrimony: ſome of whom are ſtill the ornaments of this ſeat of learning; and others at a greater diſtance continue doing honour to its inſtitutions, by comparing our polity and laws with thoſe of other kingdoms abroad, or exerting their ſenatorial abilities in the councils of the nation at home.

NOR will ſome degree of legal knowledge be found in the leaſt ſuperfluous to perſons of inferior rank: eſpecially thoſe

[h] *Brut.* 41.

of

of the learned profeſſions. The clergy in particular, beſides the common obligations they are under in proportion to their rank and fortune, have alſo abundant reaſon, conſidered
[14] merely as clergymen, to be acquainted with many branches of the law, which are almoſt peculiar and appropriated to themſelves alone. Such are the laws relating to advowſons, inſtitutions, and inductions; to ſimony, and ſimoniacal contracts; to uniformity, reſidence, and pluralities; to tithes, and other eccleſiaſtical dues; to marriages, (more eſpecially of late,) and to a variety of other ſubjects, which are conſigned to the care of their order by the proviſions of particular ſtatutes. To underſtand theſe aright, to diſcern what is warranted or enjoined, and what is forbidden by law, demands a ſort of legal apprehenſion; which is no otherwiſe to be acquired, than by uſe and a familar acquaintance with legal writers.

FOR the gentlemen of the faculty of phyſic, I muſt frankly own that I ſee no ſpecial reaſon, why they in particular ſhould apply themſelves to the ſtudy of the law; unleſs in common with other gentlemen, and to complete the character of general and extenſive knowledge; a character which their profeſſion, beyond others, has remarkably deſerved. They will give me leave, however, to ſuggeſt, and that not ludicrouſly, that it might frequently be of uſe to families upon ſudden emergencies, if the phyſician were acquainted with the doctrine of laſt wills and teſtaments, at leaſt ſo far as relates to the formal part of their execution.

BUT thoſe gentlemen who intend to profeſs the civil and eccleſiaſtical laws, in the ſpiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the moſt indiſpenſably obliged to apply themſelves ſeriouſly to the ſtudy of our municipal laws. For the civil and canon laws, conſidered with reſpect to any intrinſic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as theſe foreign laws, on account of ſome peculiar

liar propriety, have in ſome particular caſes, and in ſome particular courts, been introduced and allowed by our laws, ſo far they oblige, and no farther; their authority being wholly founded upon that permiſſion and adoption. In which we are not ſingular in our notions: for even in Hol- [15]
land, where the imperial law is much cultivated and its deciſions pretty generally followed, we are informed by Van Leeuwen [i], that "it receives its force from cuſtom and the "conſent of the people either tacitly or expreſsly given: for "otherwiſe (he adds) we ſhould no more be bound by this "law, than by that of the Almains, the Franks, the Saxons, "the Goths, the Vandals, and other of the antient nations." Wherefore, in all points in which the different ſyſtems depart from each other, the law of the land takes place of the law of Rome, whether antient or modern, imperial or pontifical. And, in thoſe of our Engliſh courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themſelves to other matters than are permitted to them; or if ſuch courts proceed according to the deciſions of thoſe laws, in caſes wherein it is controlled by the law of the land, the common law in either inſtance both may, and frequently does, prohibit and annul their proceedings [k]: and it will not be a ſufficient excuſe for them to tell the king's courts at Weſtminſter, that their practice is warranted by the laws of Juſtinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reaſon it becomes highly neceſſary for every civilian and canoniſt, that would act with ſafety as a judge, or with prudence and reputation as an advocate, to know in what caſes and how far the Engliſh laws have given ſanction to the Roman; in what points the latter are rejected; and where they are both ſo intermixed and blended together as to form certain ſupplemental parts of the common law of England, diſtinguiſhed by the titles of the king's maritime, the king's military, and the king's eccle-

[i] *Dedicatio corporis juris civilis. Edit.* 1663.

[k] Hale Hiſt. C. L. c. 2. Selden *in Fletam*, 5 Rep. Caudrey's caſe. 2 Inſt. 599.

ſiaſtical

ſiaſtical law. The propriety of which inquiry the univerſity of Oxford has for more than a century ſo thoroughly ſeen, that in her ſtatutes[l] ſhe appoints, that one of the three queſtions to be annually diſcuſſed at the act by the juriſt-inceptors ſhall relate to the common law; ſubjoining this reaſon,
[16] "*quia juris civilis ſtudioſos decet haud imperitos eſſe juris municipalis, et differentias exteri patriique juris notas habere.*" And the ſtatutes[m] of the univerſity of Cambridge ſpeak expreſsly to the ſame effect.

FROM the general uſe and neceſſity of ſome acquaintance with the common law, the inference were extremely eaſy with regard to the propriety of the preſent inſtitution, in a place to which gentlemen of all ranks and degrees reſort, as the fountain of all uſeful knowledge. But how it has come to paſs that a deſign of this ſort has never before taken place in the univerſity, and the reaſon why the ſtudy of our laws has in general fallen into diſuſe, I ſhall previouſly proceed to inquire.

SIR John Forteſcue, in his panegyric on the laws of England, (which was written in the reign of Henry the ſixth) puts[n] a very obvious queſtion in the mouth of the young prince, whom he is exhorting to apply himſelf to that branch of learning; "why the laws of England, being ſo good, "ſo fruitful, and ſo commodious, are not taught in the uni-"verſities, as the civil and canon laws are?" In anſwer to which he gives[o] what ſeems, with due deference be it ſpoken, a very jejune and unſatisfactory reaſon; being, in ſhort, that "as the proceedings at common law were in his time car-"ried on in three different tongues, the Engliſh, the Latin, "and the French, that ſcience muſt be neceſſarily taught "in thoſe three ſeveral languages; but that in the univerſi-"ties all ſciences were taught in the Latin tongue only;" and therefore he concludes, "that they could not be conve-

[l] *Tit. VII. Sect.* 2. § 2.

[m] *Doctor legum nec a doctoratu dabit operam legibus Angliae, ut non ſit imperitus earum legum quas habet ſua patria, et differentias exteri patriique juris noſcat. Stat.* Eliz. *R.* c. 14. Cowel. *Inſtitut. in præmio.*

[n] c. 47. [o] c. 48.

niently

"niently taught or ſtudied in our univerſities." But without attempting to examine ſeriouſly the validity of this reaſon, (the very ſhadow of which by the wiſdom of your late conſtitutions is entirely taken away,) we perhaps may find out a better, or at leaſt a more plauſible account, why the ſtudy of the municipal laws has been baniſhed from theſe ſeats of ſcience, than what the learned chancellor thought it prudent to give to his royal pupil.

THAT antient collection of unwritten maxims and cuſ- [17]
toms, which is called the common law, however compounded or from whatever fountains derived, had ſubſiſted immemorially in this kingdom; and, though ſomewhat altered and impaired by the violence of the times, had in great meaſure weathered the rude ſhock of the Norman conqueſt. This had endeared it to the people in general, as well becauſe it's deciſions were univerſally known, as becauſe it was found to be excellently adapted to the genius of the Engliſh nation. In the knowlege of this law conſiſted great part of the learning of thoſe dark ages; it was then taught, ſays Mr. Selden[p], in the monaſteries, *in the univerſities*, and in the families of the principal nobility. The clergy in particular, as they then engroſſed almoſt every other branch of learning, ſo (like their predeceſſors the Britiſh Druids[q]) they were peculiarly remarkable for their proficiency in the ſtudy of the law. *Nullus clericus niſi cauſidicus*, is the character given of them ſoon after the conqueſt by William of Malmſbury[r]. The judges therefore were uſually created out of the ſacred order[s], as was likewiſe the caſe among the Normans[t]; and all the inferior offices were ſupplied by the lower clergy, which has occaſioned their ſucceſſors to be denominated *clerks* to this day.

[p] *in Fletam.* 7. 7.
[q] Caeſar *de bello Gal.* 6. 12.
[r] *de geſt. reg. l.* 4.
[s] Dugdale *Orig. jurid. c.* 8.
[t] *Les juges ſont ſages perſonnes et autentiques,—ſcome les archeveſques, eveſques, les chanoines des egliſes cathedraulx, et les autres perſonnes qui ont dignitez in ſaincte egliſe; les abbez, les prieurs conventaulx, et les gouverneurs des egliſes, &c.* Grand Couſtumier, *ch.* 9.

But the common law of England, being not committed to writing, but only handed down by tradition, uſe, and experience, was not ſo heartily reliſhed by the foreign clergy; who came over hither in ſhoals during the reign of the conqueror and his two ſons, and were utter ſtrangers to our conſtitution as well as our language. And an accident, which ſoon after happened, had nearly completed it's ruin. A copy of Juſtinian's pandects, being newly [u] diſcovered at
[18] Amalfi, ſoon brought the civil law into vogue all over the weſt of Europe, where before it was quite laid aſide [w] and in a manner forgotten; though ſome traces of its authority remained in Italy [x] and the eaſtern provinces of the empire [y]. This now became in a particular manner the favourite of the popiſh clergy, who borrowed the method and many of the maxims of the canon law from this original. The ſtudy of it was introduced into ſeveral univerſities abroad, particularly that of Bologna; where exerciſes were performed, lectures read, and degrees conferred in this faculty, as in other branches of ſcience: and many nations on the continent, juſt then beginning to recover from the convulſions conſequent upon the overthrow of the Roman empire, and ſettling by degrees into peaceable forms of government, adopted the civil law, (being the beſt written ſyſtem then extant,) as the baſis of their ſeveral conſtitutions; blending and interweaving it among their own feodal cuſtoms, in ſome places with a more extenſive, in others a more confined authority [z].

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the ſee of Canterbury [a], and extremely addicted to this new ſtudy, brought over with him in his retinue many learned proficients therein; and among the reſt Roger ſirnamed Vacarius, whom he placed in the univerſity of Oxford [b], to teach it to the people of this country. But it did

[u] *circ. A. D.* 1130.
[w] *LL. Wiſigoth.* 2. 1. 9.
[x] *Capitular. Hludov. Pii.* 4. 102.
[y] Selden *in Fletam.* 5. 5.
[z] Domat's treatiſe of law. *c.* 13. § 9.
Epiſtol. Innocent. IV. in M. Paris ad A. D. 1254.
[a] *A. D.* 1138.
[b] Gervaſ. Dorobern. *Act. Pontif. Cantuar. col.* 1665.

not

not meet with the ſame eaſy reception in England, where a mild and rational ſyſtem of laws had been long eſtabliſhed, as it did upon the continent; and though the monkiſh clergy (devoted to the will of a foreign primate) received it with eagerneſs and zeal, yet the laity, who were more intereſted to preſerve the old conſtitution, and had already ſeverely felt the effect of many Norman innovations, continued wedded to the uſe of the common law. King Stephen immediately publiſhed a proclamation[c], forbidding the ſtudy of the laws, [19] then newly imported from Italy; which was treated by the monks[d] as a piece of impiety, and though it might prevent the introduction of the civil law proceſs into our courts of juſtice, yet did not hinder the clergy from reading and teaching it in their own ſchools and monaſteries.

FROM this time the nation ſeems to have been divided into two parties; the biſhops and clergy, many of them foreigners, who applied themſelves wholly to the ſtudy of the civil and canon laws, which now came to be inſeparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law: both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the oppoſite ſyſtem that real merit which is abundantly to be found in each (2).

[c] Rog. Bacon. *citat. per* Selden *in Fletam.* 7. 6. *in Forteſc. c.* 33. & 8 Rep. *Pref.*

[d] Joan. Sariſburiens. *Polycrat.* 8. 22.

(2) Though the civil law, in matters of contract and the general commerce of life, may be founded in principles of natural and univerſal juſtice, yet the arbitrary and deſpotic maxims, which recommended it as a favourite to the pope and the Romiſh clergy, rendered it deſervedly odious to the people of England. *Quod principi placuit legis habet vigorem*, (Inſt. 1. 2. 6.) the *magna charta* of the civil law, could never be reconciled with the *judicium parium vel lex terræ.*

This appears, on the one hand, from the ſpleen with which the monaſtic writers[e] ſpeak of our municipal laws upon all occaſions; and, on the other, from the firm temper which the nobility ſhewed at the famous parliament of Merton: when the prelates endeavoured to procure an act, to declare all baſtards legitimate in caſe the parents intermarried at any time afterwards; alleging this only reaſon, becauſe holy church (that is, the canon law) declared ſuch children legitimate: but "all the earls and barons (ſays the parliament "roll[f]) with one voice anſwered, that they would not change "the laws of England, which had hitherto been uſed and "approved." And we find the ſame jealouſy prevailing above a century afterwards[g], when the nobility declared with a kind of prophetic ſpirit, "that the realm of England "hath never been unto this hour, neither by the conſent of "our lord the king and the lords of parliament ſhall it ever [20] "be, ruled or governed by the civil law[h]." And of this temper between the clergy and laity many more inſtances might be given.

WHILE things were in this ſituation, the clergy, finding it impoſſible to root out the municipal law, began to withdraw themſelves by degrees from the temporal courts; and to that end, very early in the reign of king Henry the third, epiſcopal conſtitutions were publiſhed[i], forbidding all eccleſiaſtics to appear as advocates *in foro ſaeculari*: nor did they long continue to act as judges there, not caring to take the oath of office which was then found neceſſary to be adminiſtered, that they ſhould in all things determine according to the law and cuſtom of this realm[k]; though they ſtill kept poſſeſſion of the high office of chancellor, an office then of little juridical power; and afterwards, as it's buſineſs in-

[e] *Idem, ibid.* 5. 16. Polydor. Virgil. *Hiſt. l.* 9.

[f] *Stat. Marton.* 20 *Hen. III. c.* 9. *Et omnes comites et barones una voce reſponderunt, quod nolunt leges Angliae mutare, quae hucuſque uſitatae ſunt et approbatae.*

[g] 11 Ric. II.

[h] Selden. *Jan. Anglor. l.* 2. § 43. *in Forteſc. c.* 33.

[i] Spelman. *Concil. A. D.* 1217. Wilkins, *vol.* 1. *p.* 574. 599.

[k] Selden. *in Fletam.* 9. 3.

creaſed

creaſed by degrees, they modelled the proceſs of the court at their own diſcretion.

BUT wherever they retired, and wherever their authority extended, they carried with them the ſame zeal to introduce the rules of the civil, in excluſion of the municipal law. This appears in a particular manner from the ſpiritual courts of all denominations, from the chancellor's courts in both our univerſities, and from the high court of chancery before mentioned; in all of which the proceedings are to this day in a courſe much conformed to the civil law: for which no tolerable reaſon can be aſſigned, unleſs that theſe courts were all under the immediate direction of the popiſh eccleſiaſtics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having forbidden[l] the very reading of it by the clergy, becauſe it's deciſions were not founded on the imperial conſtitutions, but merely on the cuſtoms of the laity. And if it be conſidered, that our univerſities began about that period to receive their preſent form of ſcholaſtic diſcipline; that they were then, and continued to be till the time of the reformation, entirely under the influence of the popiſh clergy; (ſir John Maſon the firſt proteſtant, being alſo the firſt lay, chancellor of Oxford;) this will lead us to perceive the reaſon, why the ſtudy of the Roman laws was in thoſe days of bigotry[m] purſued with ſuch alacrity [21]

l M. Paris *ad A. D.* 1254.

m There cannot be a ſtronger inſtance of the abſurd and ſuperſtitious veneration that was paid to theſe laws, than that the moſt learned writers of the times thought they could not form a perfect character, even of the bleſſed virgin, without making her a civilian and a canoniſt; which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus chriſtiferae virginis (divinum magis quam humanum opus) qu.* 23. § 5. "*Item quod jura* "*civilia, & leges, & decreta ſcivit in* "*ſumma, probatur hoc modo: ſapientia* "*advocati manifeſtatur in tribus; unum,* "*quod obtineat omnia contra judicem* "*juſtum & ſapientem; ſecundo, quod* "*contra adverſarium aſtutum & ſagacem;* "*tertio, quod in cauſa deſperata: ſed* "*beatiſſima virgo, contra judicem ſapi-* "*entiſſimum, Dominum; contra adverſa-* "*rium callidiſſimum, dyabolum; in cau-* "*ſa noſtra deſperata; ſententiam opta-* "*tam obtinuit.*" To which an eminent franciſcan, two centuries afterwards, Bernardinus de Buſi (*Mariale, part.* 4. *ſerm.* 9.) very gravely ſubjoins this note. "*Nec videtur incongruum* "*mulieres habere peritiam juris. Legis* "*tur enim de uxore Joannis Andreae* "*gloſſatoris,*

in theſe ſeats of learning; and why the common law was entirely deſpiſed, and eſteemed little better than heretical.

AND, ſince the reformation, many cauſes have conſpired to prevent it's becoming a part of academical education. As, firſt, long uſage and eſtabliſhed cuſtom; which, as in every thing elſe, ſo eſpecially in the forms of ſcholaſtic exerciſe, have juſtly great weight and authority. Secondly, the real intrinſic merit of the civil law, conſidered upon the footing of reaſon and not of obligation, which was well known to the inſtructors of our youth; and their total ignorance of the merit of the common law, though it's equal at leaſt, and perhaps an improvement on the other. But the principal reaſon of all, that has hindered the introduction of this branch of learning, is, that the ſtudy of the common law, being baniſhed from hence in the times of popery, has fallen into a quite different channel, and has hitherto been wholly cultivated in another place. But as the long uſage and eſtabliſhed cuſtom, of ignorance of the laws of the land, begin now to be thought unreaſonable; and as by theſe means the merit
[24] of thoſe laws will probably be more generally known; we may hope that the method of ſtudying them will ſoon revert to it's antient courſe, and the foundations at leaſt of that ſcience will be laid in the two univerſities; without being excluſively confined to the channel which it fell into at the times I have juſt been deſcribing.

FOR, being then entirely abandoned by the clergy, a few ſtragglers excepted, the ſtudy and practice of it devolved of courſe into the hands of laymen: who entertained upon their parts a moſt hearty averſion to the civil law[n], and made no ſcruple to profeſs their contempt, nay even their ignorance[o]

[n] *gloſſatoris, quod tantam peritiam in utroque jure habuit, ut publice in ſcholis legere auſa ſit.*"

[n] Forteſc. *de laud. LL. c.* 25.

[o] This remarkably appeared in the caſe of the abbot of Torun, *Mr.* 22 *Edw. III.* 24. who had cauſed a certain prior to be ſummoned to anſwer at Avignon for erecting an oratory *contra inhibitionem novi operis*; by which words Mr Selden, *(in Fict.* 8. 5.) very juſtly underſtands to be meant the title *de novi operis*

of it, in the moſt public manner. But ſtill as the balance of learning was greatly on the ſide of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it muſt have been ſubjected to many inconveniences, and perhaps would have been gradually loſt and overrun by the civil, (a ſuſpicion well juſtified from the frequent tranſcripts of Juſtinian to be met with in Bracton and Fleta,) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to it's ſupport.

THE incident which I mean was the fixing the court of common pleas, the grand tribunal for diſputes of property, to be held in one certain ſpot; that the ſeat of ordinary juſtice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other ſuperior courts, was held before the king's capital juſticiary of England, in [23] the *aula regis*, or ſuch of his palaces wherein his royal perſon reſided; and removed with his houſehold from one end of the kingdom to the other. This was found to occaſion great inconvenience to the ſuitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third [p], that "common pleas ſhould "no longer follow the king's court, but be held in ſome "certain place:" in conſequence of which they have ever ſince been held (a few neceſſary removals in times of the plague excepted) in the palace of Weſtminſter only. This brought together the profeſſors of the municipal law, who before were diſperſed about the kingdom, and formed them into an aggregate body; whereby a ſociety was eſtabliſhed of

operis nuntiatione both in the civil and canon laws, (*Ff.* 39. 1. *C.* 8. 11. and *Decretal.* not *Extrav.* 5. 32.) whereby the erection of any new buildings in prejudice of more antient ones was prohibited. But Skipwith the king's ſerjeant, and afterwards chief baron of the Exchequer, declares them to be flat nonſenſe; "*in ceux parolx*, contra inhibitionem novi operis, *ay ad pas entendment*:" and juſtice Schardelow mends the matter but little by informing him, that they ſignify a reſtitution *in their laws*: for which reaſon he very ſagely reſolves to pay no ſort of regard to them. "*Ceo n'eſt que un reſtitution en lour ley, pur que a ceo n'avomus regard, &c.*" [p] *c.* 11.

perſons, who, (as Spelman[q] obſerves,) addicting themſelves wholly to the ſtudy of the laws of the land, and no longer conſidering it as a mere ſubordinate ſcience for the amuſement of leiſure hours, ſoon raiſed thoſe laws to that pitch of perfection, which they ſuddenly attained under the auſpices of our Engliſh Juſtinian, king Edward the firſt.

In conſequence of this lucky aſſemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it neceſſary to eſtabliſh a new univerſity of their own. This they did by purchaſing at various times certain houſes (now called the inns of court and of chancery) between the city of Weſtminſter, the place of holding the king's courts, and the city of London; for advantage of ready acceſs to the one, and plenty of proviſions in the other[r]. Here exerciſes were performed, lectures read, and degrees were at length conferred in the common law, as at other univerſities in the canon and civil. The degrees were thoſe of barriſters (firſt ſtiled apprentices[s] from
[24] *apprendre*, to learn) who anſwered to our bachelors: as the ſtate and degree of a ſerjeant[t], *ſervientis ad legem*, did to that of doctor.

q *Gloſſar.* 334.

r Forteſc. *c.* 48.

s Apprentices or barriſters ſeem to have been firſt appointed by an ordinance of king Edward the firſt in parliament, in the 20th year of his reign. (Spelm. *Gloſſ.* 37. Dugdale, *Orig. jurid.* 55.)

t The firſt mention which I have met with in our law books of ſerjeants or countors, is in the ſtatute of Weſtm. 1. 3 Edw. I. *c.* 29. and in Horn's Mirror, *c.* 1. § 10. *c.* 2. § 5. *c.* 3. § 1. in the ſame reign. But M. Paris in his life of John II. abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. ſpeaks of advocates at the common law, or countors, (*quos banci narratores vulgariter appellamus*,) as of an order of men well known. And we have an example of the antiquity of the coif in the ſame author's hiſtory of England, *A. D.* 1259. in the caſe of one William de Buſſy; who, being called to account for his great knavery and mal-practices, claimed the benefit of his orders or clergy, which till then remained an entire ſecret; and to that end *voluit ligamenta coifae ſuae ſolvere, ut palam monſtraret ſe tonſuram habere clericalem; ſed non eſt permiſſus.——Satellites vero eum arripiens, non per coifae ligamina ſed per guttur eum apprehendens, traxit ad carcerem.* And hence ſir H. Spelman conjectures, (*Gloſſar.* 335.) that coifs were introduced to hide the tonſure of ſuch renegade clerks, as were ſtill tempted to remain in the ſecular courts in the quality of advocates or judges, notwithſtanding their prohibition by canon.

THE

THE crown ſeems to have ſoon taken under it's protection this infant ſeminary of common law; and, the more effectually to foſter and cheriſh it, king Henry the third, in the nineteenth year of his reign, iſſued out an order directed to the mayor and ſheriffs of London, commanding that no regent of any law ſchools *within* that city ſhould for the future teach law therein [u]. The word, law, or *leges*, being a general term, may create ſome doubt at this diſtance of time whether the teaching of the civil law, or the common, or both, is hereby reſtrained. But in either caſe it tends to the ſame end. If the civil law only is prohibited, (which is Mr Selden's [w] opinion,) it is then a retaliation upon the clergy, who had excluded the common law from *their* ſeats of learning. If the municipal law be alſo included in the reſtriction, (as ſir Edward Coke [x] underſtands it, and which the words ſeem to import,) then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public univerſity, which was newly inſtituted in the ſuburbs.

IN this juridical univerſity (for ſuch it is inſiſted to have been by Forteſcue [y] and ſir Edward Coke [z]) there are two ſorts of collegiate houſes; one called inns of chancery, in which the younger ſtudents of the law were uſually placed, "learning and ſtudying, ſays Forteſcue [a], the originals, and "as it were the elements of the law; who, profiting therein, "as they grew to ripeneſs, ſo were they admitted into the "greater inns of the ſame ſtudy, called the inns of court." And in theſe inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did uſe to place their children, though they did not deſire to have them thoroughly learned in the law, or to get their living by it's practice: and that in his time there were about two thouſand ſtudents at theſe ſeveral inns, all of whom he informs us were *filii nobilium*, or gentlemen born. [25]

[u] *Ne aliquis ſcholas regens de legibus in eadem civitate de cætero ibidem leges doceat.*

[w] *in Flet.* 8. 2.

[x] 2 Inſt. proëm.

[y] c. 49.

[z] 3 Rep. præf.

[a] c. 49.

HENCE

HENCE it is evident, that (though under the influence of the monks our univerſities neglected this ſtudy, yet) in the time of Henry the ſixth it was thought highly neceſſary, and was the univerſal practice, for the young nobility and gentry to be inſtructed in the originals and elements of the laws. But by degrees this cuſtom has fallen into diſuſe; ſo that in the reign of queen Elizabeth ſir Edward Coke [b] does not reckon above a thouſand ſtudents, and the number at preſent is very conſiderably leſs. Which ſeems principally owing to theſe reaſons: firſt, becauſe the inns of chancery being now almoſt totally filled by the inferior branch of the profeſſion, are neither commodious nor proper for the reſort of gentlemen of any rank or figure; ſo that there are very rarely (3) any young ſtudents entered at the inns of chancery: ſecondly, becauſe in the inns of court all ſorts of regimen and academical ſuperintendance, either with regard to morals or ſtudies, are found impracticable, and therefore entirely neglected: laſtly, becauſe perſons of birth and fortune, after having finiſhed their uſual courſes at the univerſities, have
[26] ſeldom leiſure or reſolution ſufficient to enter upon a new ſcheme of ſtudy at a new place of inſtruction. Wherefore few gentlemen now reſort to the inns of court, but ſuch for whom the knowledge of practice is abſolutely neceſſary; ſuch, I mean, as are intended for the profeſſion: the reſt of our gentry (not to ſay our nobility alſo) having uſually re-

[b] 3 Rep. pref.

(3) The inns of court are, the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn, from which ſocieties alone, ſtudents are called to the bar. The inns of chancery are, Clifford's Inn, Clement's Inn, Lion's Inn, New Inn, Furnival's Inn, Thavies's Inn, Staple's Inn, and Barnard's Inn. Theſe are ſubordinate to the inns of court; the three firſt belong to the Inner Temple, the fourth to the Middle Temple, the two next to Lincoln's Inn, and the two laſt to Gray's Inn. (Dug. *Orig. jurid.* 320 & *paſſim.*) Gentlemen are never entered at preſent in the inns of chancery with an intention of being called to the bar, for admiſſion there would now be of no avail with regard to the time and attendance required by the inns of court.

tired

tired to their eſtates, or viſited foreign kingdoms, or entered upon public life, without any inſtruction in the laws of the land, and indeed with hardly any opportunity of gaining inſtruction, unleſs it can be afforded them in theſe ſeats of learning.

AND that theſe are the proper places, for affording aſſiſtances of this kind to gentlemen of all ſtations and degrees, cannot (I think) with any colour of reaſon be denied. For not one of the objections, which are made to the inns of court and chancery, and which I have juſt now enumerated, will hold with regard to the univerſities. Gentlemen may here aſſociate with gentlemen of their own rank and degree. Nor are their conduct and ſtudies left entirely to their own diſcretion; but regulated by a diſcipline ſo wiſe and exact, yet ſo liberal, ſo ſenſible, and manly, that their conformity to its rules (which does at preſent ſo much honour to our youth) is not more the effect of conſtraint than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amuſements, or (what is a more noble object) the ſervice of their friends and their country. This ſtudy will go hand in hand with their other purſuits: it will obſtruct none of them; it will ornament and aſſiſt them all.

BUT if, upon the whole, there are any ſtill wedded to monaſtic prejudice, that can entertain a doubt how far this ſtudy is properly and regularly *academical*, ſuch perſons I am afraid either have not conſidered the conſtitution and deſign of an univerſity, or elſe think very meanly of it. It muſt be a deplorable narrowneſs of mind, that would confine theſe ſeats of inſtruction to the limited views of one or two learned profeſſions. To the praiſe of this age be it ſpoken, a more open and generous way of thinking begins now univerſally [27] to prevail. The attainment of liberal and genteel accompliſhments, though not of the intellectual ſort, has been thought by our wiſeſt and moſt affectionate patrons[c], and

[c] Lord chancellor Clarendon, in his dialogue of education, among his tracts, p. 325. appears to have been very ſolicitous, that it might be made "a part "of

very lately by the whole univerſity [d], no ſmall improvement of our antient plan of education: and therefore I may ſafely affirm that nothing (how *unuſual* ſoever) is, under due regulations, improper to be *taught* in this place, which is proper for a gentleman to *learn*. But that a ſcience, which diſtinguiſhes the criterions of right and wrong; which teaches to eſtabliſh the one, and prevent, puniſh, or redreſs the other; which employs in it's theory the nobleſt faculties of the ſoul, and exerts in it's practice the cardinal virtues of the heart; a ſcience, which is univerſal in it's uſe and extent, accommodated to each individual, yet comprehending the whole community; that a ſcience like this ſhould ever have been deemed unneceſſary to be ſtudied in an univerſity, is matter of aſtoniſhment and concern. Surely, if it were not before an object of academical knowlege, it was high time to make it one: and to thoſe who can doubt the propriety of its reception among us, (if any ſuch there be,) we may return an anſwer in their own way, that ethics are confeſſedly a branch of academical learning; and Ariſtotle *himſelf has ſaid*, ſpeaking of the laws of his own country, that juriſprudence, or the knowlege of thoſe laws, is the principal and moſt perfect branch of ethics [e].

FROM a thorough conviction of this truth, our munificent benefactor, Mr VINER, having employed above half a century in amaſſing materials for new-modelling and rendering more commodious the rude ſtudy of the laws of the land, conſigned
[28] both the plan and execution of theſe his public-ſpirited deſigns to the wiſdom of his parent univerſity. Reſolving to dedicate his learned labours "to the benefit of poſterity and

"of the ornament of our learned academies, to teach the qualities of "riding, dancing, and fencing, at thoſe "hours when more ſerious exerciſes "ſhould be intermitted."

[d] By accepting in full convocation the remainder of Lord Clarendon's hiſtory from his noble deſcendants, on condition to apply the profits ariſing from it's publication to the eſtabliſhment of a *manage* in the univerſity.

[e] Τελεια μαλιστα αρετη, ὁτι τις τελειαν αρετης χρησιν ε'χει. *Ethic. ad Nicomach. l.* 5. *c.* 3.

"the perpetual ſervice of his country[f]," he was ſenſible he could not perform his reſolution in a better and more effectual manner, than by extending to the youth of this place, thoſe aſſiſtances of which he ſo well remembered and ſo heartily regretted the want. And the ſenſe, which the univerſity has entertained of this ample and moſt uſeful benefaction, muſt appear beyond a doubt, from their gratitude in receiving it with all poſſible marks of eſteem[g]; from their alacrity and unexampled diſpatch in carrying it into execution[h]; and, above all, from the laws and conſtitutions by which they have effectually guarded it from the neglect and abuſe to which ſuch inſtitutions are liable[i]. We have

[f] See the preface to the eighteenth volume of his abridgment.

[g] Mr Viner is enrolled among the public benefactors of the univerſity by decree of convocation.

[h] Mr Viner died June 5, 1756. His effects were collected and ſettled, near a volume of his work printed, almoſt the whole diſpoſed of, and the accounts made up, in a year and a half from his deceaſe, by the very diligent and worthy adminiſtrators with the will annexed, (Dr Weſt and Dr Good of Magdalene, Dr Whalley of Oriel, Mr Buckler of All Souls, and Mr Betts of Univerſity college,) to whom that care was conſigned by the univerſity. Another half year was employed in conſidering and ſettling a plan of the propoſed inſtitution, and in framing the ſtatutes thereupon, which were finally confirmed by convocation on the 3d of July 1758. The profeſſor was elected on the 20th of October following, and two ſcholars on the ſucceeding day. And, laſtly, it was agreed at the annual audit in 1761, to eſtabliſh a fellowſhip; and a fellow was accordingly elected in January following.—The reſidue of this fund, ariſing from the ſale of Mr Viner's abridgment, will probably be ſufficient hereafter to found another fellowſhip and ſcholarſhip, or three more ſcholarſhips, as ſhall be thought moſt expedient.

[i] THE ſtatutes are in ſubſtance as follows.

1. THAT the accounts of this benefaction be ſeparately kept, and annually audited by the delegates of accounts and profeſſor, and afterwards reported to convocation.

2. THAT a profeſſorſhip of the laws of England be eſtabliſhed, with a ſalary of two hundred pounds *per annum*; the profeſſor to be elected by convocation, and to be at the time of his election at leaſt a maſter of arts or bachelor of civil law in the univerſity of Oxford, of ten years ſtanding from his matriculation; and alſo a barriſter at law of four years ſtanding at the bar.

3. THAT ſuch profeſſor (by himſelf, or by deputy to be previouſly approved by convocation) do read one ſolemn public lecture on the laws of England, and in the Engliſh language, in every academical term, at certain ſtated times previous to the commencement of the common law term; or forfeit twenty pounds for every omiſſion to Mr Viner's

ſeen an univerſal emulation, who beſt ſhould underſtand, or moſt faithfully purſue, the deſigns of our generous patron:

ner's general fund: and alſo (by himſelf, or by deputy to be approved, if occaſional, by the vice-chancellor and proctors; or, if permanent, both the cauſe and the deputy to be annually approved by convocation) do yearly read one complete courſe of lectures on the laws of England, and in the Engliſh language, conſiſting of ſixty lectures at the leaſt; to be read during the univerſity term time, with ſuch proper intervals that not more than four lectures may fall within any ſingle week: that the profeſſor do give a month's notice of the time when the courſe is to begin, and do read *gratis* to the ſcholars of Mr Viner's foundation; but may demand of other auditors ſuch gratuity as ſhall be ſettled from time to time by decree of convocation; and that for every of the ſaid ſixty lectures omitted, the profeſſor, on complaint made to the vice-chancellor within the year, do forfeit forty ſhillings to Mr Viner's general fund; the proof of having performed his duty to lie upon the ſaid profeſſor.

4. THAT every profeſſor do continue in his office during life, unleſs in caſe of ſuch miſbehaviour as ſhall amount to bannition by the univerſity ſtatutes; or unleſs he deſerts the profeſſion of the law by betaking himſelf to another profeſſion; or unleſs, after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omiſſion; in any of which caſes he be deprived by the vice-chancellor, with conſent of the houſe of convocation.

5. THAT ſuch a number of fellowſhips with a ſtipend of fifty pounds *per annum*, and ſcholarſhips with a ſtipend of thirty pounds, be eſtabliſhed, as the convocation ſhall from time to time ordain, according to the ſtate of Mr Viner's revenues.

6. THAT every fellow be elected by convocation, and at the time of election be unmarried, and at leaſt a maſter of arts or bachelor of civil law, and a member of ſome college or hall in the univerſity of Oxford; the ſcholars of this foundation, or ſuch as have been ſcholars, (if qualified and approved of by convocation,) to have the preference: that if not a barriſter when choſen, he be called to the bar within one year after his election; but do reſide in the univerſity two months in every year, or in caſe of non-reſidence do forfeit the ſtipend of that year to Mr Viner's general fund.

7. THAT every ſcholar be elected by convocation, and at the time of election be unmarried, and a member of ſome college or hall in the univerſity of Oxford, who ſhall have been matriculated twenty-four calendar months at the leaſt; that he do take the degree of bachelor of civil law with all convenient ſpeed (either proceeding in arts or otherwiſe); and previous to his taking the ſame, between the ſecond and eighth year from his matriculation, be bound to attend two courſes of the profeſſor's lectures, to be certified under the profeſſor's hand; and within one year after taking the ſame to be called to the bar; that he do annually reſide ſix months till he is of four years ſtanding, and four months from that time till he is maſter of arts or bachelor of civil law; after which he be bound to reſide two months in every year; or in caſe of non-reſidence, do forfeit the ſtipend of that year to Mr Viner's general fund.

8. THAT the ſcholarſhips do become void in caſe of non-attendance on the profeſſor, or not taking the degree of bachelor

and with pleaſure we recollect, that thoſe who are moſt diſtinguiſhed by their quality, their fortune, their ſtation, their learning, or their experience, have appeared the moſt zealous to promote the ſucceſs of Mr Viner's eſtabliſhment.

THE advantages that might reſult to the ſcience of the law itſelf, when a little more attended to in theſe ſeats of knowlege, perhaps, would be very conſiderable. The leiſure and abilities of the learned in theſe retirements might either ſuggeſt expedients, or execute thoſe dictated by wiſer heads [k], for improving it's method, retrenching it's ſuperfluities, and reconciling the little contrarieties, which the practice of many centuries will neceſſarily create in any human ſyſtem: a taſk, which thoſe, who are deeply employed in buſineſs and the more active ſcenes of the profeſſion, can hardly condeſcend to engage in. And as to the intereſt, or (which is the ſame) the reputation of the univerſities themſelves, I may venture to pronounce, that if ever this ſtudy ſhould arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not ſhorten their reſidence upon this account, nor perhaps entertain a worſe opinion of the benefits of academical edu-

bachelor of civil law, being duly admoniſhed ſo to do by the vice-chancellor and proctors: and that both fellowſhips and ſcholarſhips do expire at the end of ten years after each reſpective election; and become void in caſe of groſs miſbehaviour, non-reſidence for two years together, marriage, not being called to the bar within the time before limited, (being duly admoniſhed ſo to be by the vice-chancellor and proctors,) or deſerting the profeſſion of the law by following any other profeſſion: and that in any of theſe caſes the vice chancellor, with conſent of convocation, do declare the place actually void.

9. THAT in caſe of any vacancy of the profeſſorſhip, fellowſhips, or ſcholarſhips, the profits of the current year be rateably divided between the predeceſſor, or his repreſentatives, and the ſucceſſor; and that a new election be had within one month afterwards, unleſs by that means the time of election ſhall fall within any vacation, in which caſe it be deferred to the firſt week in the next full term. And that before any convocation ſhall be held for ſuch election, or for any other matter relating to Mr Viner's benefaction, ten days public notice be given to each college and hall of the convocation, and the cauſe of convoking it.

[k] See lord Bacon's propoſals and offer of a digeſt.

cation. Neither ſhould it be conſidered as a matter of light importance, that while we thus extend the *pomoeria* of univerſity learning, and adopt a new tribe of citizens within
[31] theſe philoſophical walls, we intereſt a very numerous and very powerful profeſſion in the preſervation of our rights and revenues.

FOR I think it paſt diſpute that thoſe gentlemen, who reſort to the inns of court with a view to purſue the profeſſion, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other ſcience, in one of our learned univerſities. We may appeal to the experience of every ſenſible lawyer, whether any thing can be more hazardous or diſcouraging than the uſual entrance on the ſtudy of the law. A raw and unexperienced youth, in the moſt dangerous ſeaſon of life, is tranſplanted on a ſudden into the midſt of allurements to pleaſure, without any reſtraint or check but what his own prudence can ſuggeſt; with no public direction in what courſe to purſue his inquiries; no private aſſiſtance to remove the diſtreſſes and difficulties which will always embarraſs a beginner. In this ſituation he is expected to ſequeſter himſelf from the world, and by a tedious lonely proceſs to extract the theory of law from a maſs of undigeſted learning; or elſe by an aſſiduous attendance on the courts to pick up theory and practice together, ſufficient to qualify him for the ordinary run of buſineſs. How little therefore is it to be wondered at, that we hear of ſo frequent miſcarriages; that ſo many gentlemen of bright imaginations grow weary of ſo unpromiſing a ſearch [1], and addict themſelves wholly to amuſements, or other leſs innocent purſuits; and that ſo many perſons of moderate capacity confuſe themſelves at firſt ſetting out, and continue

[1] Sir Henry Spelman in the preface to his gloſſary, has given us a very lively picture of his own diſtreſs upon this occaſion. "*Emiſit me mater Londinum, "juris noſtri capeſſendi gratia; cujus "cum veſtibulum ſalutaſſem, reperiſſem- "que linguam peregrinam, dialectum "barbaram, methodum inconcinnam, mo- "lem non ingentem ſolum ſed perpetuis "humeris ſuſtinendam, excidit mihi (ſa- "tetor) animus, &c.*"

ever

ever dark and puzzled during the remainder of their lives!

THE evident want of ſome aſſiſtance in the rudiments of legal knowlege has given birth to a practice, which if ever it had grown to be general, muſt have proved of extremely pernicious conſequence. I mean the cuſtom by ſome ſo very warmly recommended, of dropping all liberal education, as of no uſe to ſtudents in the law: and placing them, in it's ſtead, at the deſk of ſome ſkilful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of buſineſs. A few inſtances of particular perſons, (men of excellent learning, and unblemiſhed integrity,) who, in ſpite of this method of education, have ſhone in the foremoſt ranks of the bar, have afforded ſome kind of ſanction to this illiberal path to the profeſſion, and biaſſed many parents, of ſhortſighted judgment, in it's favour: not conſidering that there are ſome geniuſes, formed to overcome all diſadvantages, and that from ſuch particular inſtances no general rules can be formed; nor obſerving, that thoſe very perſons have frequently recommended by the moſt forcible of all examples, the diſpoſal of their own offspring, a very different foundation of legal ſtudies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal ſeats of juſtice, and ſuggeſt a few hints, in favour of univerſity learning [m]:—but in theſe all who hear me, I know have already prevented me. [32]

MAKING therefore due allowance for one or two ſhining exceptions, experience may teach us to foretell that a lawyer

[m] The four higheſt judicial offices were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another, ſtudent of Chriſt Church; and the fourth a fellow of Trinity college, Cambridge (4).

(4) The two firſt were, Lord Northington and Lord Chief Juſtice Willes; the third, Lord Mansfield; and the fourth, Sir Thomas Clarke, Maſter of the Rolls.

thus educated to the bar, in ſubſervience to attorneys and ſolicitors [n], will find he has begun at the wrong end. If practice be the whole he is taught, practice muſt alſo be the whole he will ever know: if he be uninſtructed in the elements and firſt principles upon which the rule of practice is founded, the leaſt variation from eſtabliſhed precedents will totally diſtract and bewilder him: *ita lex ſcripta eſt* [o] is the utmoſt his knowlege will arrive at: he muſt never aſpire to form, and ſeldom expect to comprehend, any arguments drawn *a priori*, from the ſpirit of the laws and the natural foundations of juſtice.

[33] NOR is this all; for (as few perſons of birth, or fortune, or even of ſcholaſtic education, will ſubmit to the drudgery of ſervitude and the manual labour of copying the traſh of an office) ſhould this infatuation prevail to any conſiderable degree, we muſt rarely expect to ſee a gentleman of diſtinction or learning at the bar. And what the conſequence may be, to have the interpretation and enforcement of the laws (which include the entire diſpoſal of our properties, liberties, and lives) fall wholly into the hands of obſcure or illiterate men, is matter of very public concern (5).

[n] See Kennet's Life of Somner. p. 67. [o] *Ff.* 40. 9. 12.

(5) The learning, which of late years has diſtinguiſhed the bar, leaves little reaſon to apprehend that ſuch will ſpeedily be the degraded ſtate of the laws of England. Our author's labours and example have contributed in no inconſiderable degree to reſcue the profeſſion from the reproaches of Lord Bolingbroke, whoſe ſentiments upon the education of a barriſter, correſpond ſo fully with thoſe of the learned judge, that they deſerve to be annexed to this elegant diſſertation on the ſtudy of the law.

"I might inſtance (ſays he) in other profeſſions, the obligation men lie under of applying to certain parts of hiſtory; and I can hardly forbear doing it in that of the law, in it's nature the nobleſt and moſt beneficial to mankind, in it's abuſe and debaſement the moſt ſordid and the moſt pernicious. A lawyer now is nothing more, I ſpeak of ninety-nine in a hundred at leaſt, to uſe ſome of Tully's words, *niſi leguleius quidem cautus, et acutus prave actionum,*

THE inconveniences here pointed out can never be effectually prevented, but by making academical education a previous ſtep to the profeſſion of the common law, and at the ſame time making the rudiments of the law a part of academical education. For ſciences are of a ſociable diſpoſition, and flouriſh beſt in the neighbourhood of each other: nor is there any branch of learning, but may be helped and improved by aſſiſtances drawn from other arts. If therefore the ſtudent in our laws hath formed both his ſentiments and ſtyle, by peruſal and imitation of the pureſt claſſical writers, among whom the hiſtorians and orators will beſt deſerve his regard; if he can reaſon with preciſion, and ſeparate argument from fallacy, by the clear ſimple rules of pure unſophiſticated logic; if he can fix his attention, and ſteadily purſue truth through any the moſt intricate deduction, by the uſe of mathematical demonſtrations; if he has enlarged his conceptions of nature and art, by a view of the ſeveral branches of genuine, experimental philoſophy; if he

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cantor formularum, auceps ſyllabarum. But there have been lawyers that were orators, philoſophers, hiſtorians: there have been Bacons and Clarendons. There will be none ſuch any more, till in ſome better age true ambition, or the love of fame, prevails over avarice; and till men find leiſure and encouragement to prepare themſelves for the exerciſe of this profeſſion, by climbing up to the *vantage ground*, ſo my Lord Bacon calls it, of ſcience, inſtead of grovelling all their lives below, in a mean but gainful application to all the little arts of chicane. Till this happen, the profeſſion of the law will ſcarce deſerve to be ranked among the learned profeſſions; and whenever it happens, one of the vantage grounds to which men muſt climb is metaphyſical, and the other, hiſtorical knowledge.

"They muſt pry into the ſecret receſſes of the human heart, and become well acquainted with the whole moral world, that they may diſcover the abſtract reaſon of all laws; and they muſt trace the laws of particular ſtates, eſpecially of their own, from the firſt rough ſketches, to the more perfect draughts; from the firſt cauſes or occaſions that produced them, through all the effects, good and bad, that they produced." (Stud. of Hiſt. p. 353. quarto edition.)

has impreſſed on his mind the ſound maxims of the law of nature, the beſt and moſt authentic foundation of human laws; if, laſtly, he has contemplated thoſe maxims reduced to a practical ſyſtem in the laws of imperial Rome; if he has done this or any part of it, (though all may be eaſily done under as able inſtructors as ever graced any ſeats of learning,) a ſtudent thus qualified may enter upon the ſtudy of the law with incredible advantage and reputation. And
[34] if, at the concluſion, or during the acquiſition of theſe accompliſhments, he will afford himſelf here a year or two's farther leiſure, to lay the foundation of his future labours in a ſolid ſcientifical method, without thirſting too early to attend that practice which it is impoſſible he ſhould rightly comprehend, he will afterwards proceed with the greateſt eaſe, and will unfold the moſt intricate points with an intuitive rapidity and clearneſs.

I SHALL not inſiſt upon ſuch motives as might be drawn from principles of œconomy, and are applicable to particulars only: I reaſon upon more general topics. And therefore to the qualities of the head, which I have juſt enumerated, I cannot but add thoſe of the heart; affectionate loyalty to the king, a zeal for liberty and the conſtitution, a ſenſe of real honour, and well grounded principles of religion; as neceſſary to form a truly valuable Engliſh lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of ſome, or unkindneſs of others, may have heretofore untruly ſuggeſted, experience will warrant us to affirm, that theſe endowments of loyalty and public ſpirit, of honour and religion, are no where to be found in more high perfection than in the two univerſities of this kingdom.

BEFORE I conclude, it may perhaps be expected, that I lay before you a ſhort and general account of the method I propoſe to follow, in endeavouring to execute the truſt you have been pleaſed to repoſe in my hands. And in theſe ſolemn lectures, which are ordained to be read at the entrance of every term, (more perhaps to do public honour to this laud-

able

able inſtitution, than for the private inſtruction of individuals[p],) I preſume it will beſt anſwer the intent of our benefactor and the expectation of this learned body, if I attempt to illuſtrate at times ſuch detached titles of the law, as are the moſt eaſy to be underſtood, and moſt capable of hiſtorical or critical ornament. But in reading the complete courſe, which is annually conſigned to my care, a more regular method will be neceſſary; and, till a better is propoſed, I ſhall take the liberty to follow the ſame that I have already [35]
ſubmitted to the public[q]. To fill up and finiſh that outline with propriety and correctneſs, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to ſuppoſe acquainted with terms and ideas, which they never had opportunity to learn,) this muſt be my ardent endeavour, though by no means my promiſe, to accompliſh. You will permit me however very briefly to deſcribe, rather what I conceive an academical expounder of the laws ſhould do, than what I have ever known to be done.

HE ſhould conſider his courſe as a general map of the law, marking out the ſhape of the country, it's connexions and boundaries, it's greater diviſions and principal cities: it is not his buſineſs to deſcribe minutely the ſubordinate limits, or to fix the longitude and latitude of every inconſiderable hamlet. His attention ſhould be engaged, like that of the readers in Forteſcue's inns of chancery, "in tracing out the "originals and as it were the elements of the law." For if, as Juſtinian[r] has obſerved, the tender underſtanding of

[p] See Lowth's *Oratio Crewiana*, p. 365.

[q] The analyſis of the laws of England, firſt publiſhed, *A. D.* 1756, and exhibiting the order and principal diviſions of the enſuing COMMENTARIES; which were originally ſubmitted to the univerſity in a private courſe of lectures, *A. D.* 1753

[r] *Incipientibus nobis exponere jura populi Romani, ita videntur tradi poſſe commodiſſime, ſi primo levi ac ſimplici via ſingula tradantur: alioqui, ſi ſtatim ab initio rudem adhuc et infirmum animum ſtudioſi multitudine ac varietate rerum onerabimus, duorum alterum, aut deſertorem ſtudiorum efficiemus, aut cum magno labore, ſæpe etiam cum diffidentia (quæ plerumque juvenes avertit) ſerius ad id perducemus, ad quod, leviore via ductus, ſine magno labore, et ſine ulla diffidentia maturius perduci poteriſſet.* Inſt. I. 1. 2.

the ſtudent be loaded at the firſt with a multitude and variety of matter, it will either occaſion him to deſert his ſtudies, or will carry him heavily through them, with much labour, delay, and deſpondence. Theſe originals ſhould be traced to their fountains, as well as our diſtance will permit; to the cuſtoms of the Britons and Germans, as recorded by Caeſar and Tacitus; to the codes of the northern nations on the continent, and more eſpecially to thoſe of our own Saxon princes; to the rules of the Roman law either left here in the days of Papinian, or imported by Vacarius and
[36] his followers; but above all, to that inexhauſtible reſervoir of legal antiquities and learning, the feodal law, or, as Spelman[s] has entitled it, the law of nations in our weſtern orb. Theſe primary rules and fundamental principles ſhould be weighed and compared with the precepts of the law of nature, and the practice of other countries; ſhould be explained by reaſons, illuſtrated by examples, and confirmed by undoubted authorities; their hiſtory ſhould be deduced, their changes and revolutions obſerved, and it ſhould be ſhewn how far they are connected with, or have at any time been affected by, the civil tranſactions of the kingdom.

A PLAN of this nature, if executed with care and ability, cannot fail of adminiſtering a moſt uſeful and rational entertainment to ſtudents of all ranks and profeſſions; and yet it muſt be confeſſed that the ſtudy of the laws is not merely a matter of amuſement; for, as a very judicious writer[t] has obſerved upon a ſimilar occaſion, the learner "will be conſiderably diſappointed, if he looks for entertainment without the expence of attention." An attention, however, not greater than is uſually beſtowed in maſtering the rudiments of other ſciences, or ſometimes in purſuing a favourite recreation or exerciſe. And this attention is not equally neceſſary to be exerted by every ſtudent upon every occaſion. Some branches of the law, as the formal proceſs of civil ſuits, and the ſubtle diſtinctions incident to landed pro-

[s] Of parliaments, 57. [t] Dr Taylor's pref. to Elem. of civil law.

perty,

perty, which are the moſt difficult to be thoroughly underſtood, are the leaſt worth the pains of underſtanding, except to ſuch gentlemen as intend to purſue the profeſſion. To others I may venture to apply, with a ſlight alteration, the words of Sir John Forteſcue[u], when firſt his royal pupil determines to engage in this ſtudy. "It will not be neceſſary for a gentleman, as ſuch, to examine with a cloſe application the critical niceties of the law. It will fully be ſufficient, and he may well enough be denominated a lawyer, if under the inſtruction of a maſter he traces up the principles and grounds of the law, even to their ori- [37] ginal elements. Therefore in a very ſhort period, and with very little labour, he may be ſufficiently informed in the laws of his country, if he will but apply his mind in good earneſt to receive and apprehend them. For, though ſuch knowlege as is neceſſary for a judge is hardly to be acquired by the lucubrations of twenty years, yet, with a genius of tolerable perſpicacity, that knowlege which is fit for a perſon of birth or condition may be learned in a ſingle year, without neglecting his other improvements."

To the few therefore (the very few I am perſuaded) that entertain ſuch unworthy notions of an univerſity, as to ſuppoſe it intended for mere diſſipation of thought; to ſuch as mean only to while away the aukward interval from childhood to twenty-one, between the reſtraints of the ſchool and the licentiouſneſs of politer life, in a calm middle ſtate of mental and of moral inactivity; to theſe Mr Viner gives no invitation to an entertainment which they never can reliſh. But to the long and illuſtrious train of noble and ingenuous youth, who are not more diſtinguiſhed among us by their birth and poſſeſſions, than by the regularity of their conduct and their thirſt after uſeful knowlege, to theſe our benefactor has conſecrated the fruits of a long and laborious life, worn out in the duties of his calling; and will joyfully reflect (if ſuch reflections can be now the employment of his

[u] *De laud. Leg. c.* 8.

thoughts) that he could not more effectually have benefited poſterity, or contributed to the ſervice of the public, than by founding an inſtitution which may inſtruct the riſing generation in the wiſdom of our civil polity, and inſpire them with a deſire to be ſtill better acquainted with the laws and conſtitution of their country.

SECTION THE SECOND.

OF THE NATURE OF LAWS IN GENERAL.

LAW, in it's moſt general and comprehenſive ſenſe, ſignifies a rule of action; and is applied indiſcriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we ſay, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is preſcribed by ſome ſuperior, and which the inferior is bound to obey.

THUS when the ſupreme being formed the univerſe, and created matter out of nothing, he impreſſed certain principles upon that matter, from which it can never depart, and without which it would ceaſe to be. When he put that matter into motion, he eſtabliſhed certain laws of motion, to which all moveable bodies muſt conform. And, to deſcend from the greateſt operations to the ſmalleſt, when a workman forms a clock, or other piece of mechaniſm, he eſtabliſhes at his own pleaſure certain arbitrary laws for it's direction; as that the hand ſhall deſcribe a given ſpace in a given time; to which law as long as the work conforms, ſo long it continues in perfection, and anſwers the end of it's formation.

IF we farther advance, from mere inactive matter to vegetable and animal life, we ſhall find them ſtill governed by laws; more numerous indeed, but equally fixed and invariable. The whole progreſs of plants, from the ſeed to the root, and from thence to the ſeed again;—the method of animal nutrition, digeſtion, ſecretion, and all other branches of vital œconomy;—are not left to chance, or the will of the creature itſelf, but are performed in a wondrous involuntary

manner, and guided by unerring rules laid down by the great creator.

THIS then is the general ſignification of law, a rule of action dictated by ſome ſuperior being: and, in thoſe creatures that have neither the power to think, nor to will, ſuch laws muſt be invariably obeyed, ſo long as the creature itſelf ſubſiſts, for it's exiſtence depends on that obedience. But laws, in their more confined ſenſe (1), and in which it is our

(1) This perhaps is the only ſenſe in which the word *law* can be ſtrictly uſed; for in all caſes where it is not applied to human conduct, it may be conſidered as a metaphor, and in every inſtance a more appropriate term may be found. When it is uſed to expreſs the operations of the Deity or Creator, it comprehends ideas very different from thoſe which are included in it's ſignification when it is applied to man, or his other creatures. The volitions of the Almighty are his laws, he had only to will γενεσθω φως και εγενετο. When we apply the word *law* to motion, matter, or the works of nature or of art, we ſhall find in every caſe, that with equal or greater propriety and perſpicuity, we might have uſed the words *quality*, *property*, or *peculiarity*.—We ſay that it is a law of motion, that a body put in motion *in vacuo* muſt for ever go forward in a ſtraight line with the ſame velocity; that it is a law of nature, that particles of matter ſhall attract each other with a force that varies inverſely as the ſquare of the diſtance from each other; and mathematicians ſay, that a ſeries of numbers obſerves a certain law, when each ſubſequent term bears a certain relation or proportion to the preceding term: but in all theſe inſtances we might as well have uſed the word *property* or *quality*, it being as much the property of all matter to move in a ſtraight line, or to gravitate, as it is to be ſolid or extended; and when we ſay that it is the law of a ſeries that each term is the ſquare or ſquare-root of the preceding term, we mean nothing more than that ſuch is it's property or peculiarity. And the word *law* is uſed in this ſenſe in thoſe caſes only which are ſanctioned by uſage; as it would be thought a harſh expreſſion to ſay, that it is a law that ſnow ſhould be white, or that fire ſhould burn. When a mechanic forms a clock, he eſtabliſhes a model of it either in fact or in his mind, according to his pleaſure; but if he ſhould reſolve that the wheels of his clock ſhould move contrary to the uſual rotation of ſimilar pieces of mechaniſm,

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preſent buſineſs to conſider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the nobleſt of all ſublunary beings, a creature endowed with both reaſon and freewill, is commanded to make uſe of thoſe faculties in the general regulation of his behaviour.

MAN, conſidered as a creature, muſt neceſſarily be ſubject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to purſue, but ſuch as he preſcribes to himſelf; but a ſtate of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all thoſe points wherein his dependence conſiſts. This principle therefore has more or leſs extent and effect, in proportion as the ſuperiority of the one and the dependence of the other is greater or leſs, abſolute or limited. And conſequently, as man depends abſolutely upon his maker for every thing, it is neceſſary that he ſhould in all points conform to his maker's will.

THIS will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, eſtabliſhed certain rules for the perpetual direction of that motion; ſo, when he created man, and endued him with freewill to conduct himſelf in all parts of life, he laid down certain immutable laws of human nature, [40] whereby that freewill is in ſome degree regulated and

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we could hardly with any propriety eſtabliſhed by uſage apply the term *law* to his ſcheme. When *law* is applied to any other object than man, it ceaſes to contain two of it's eſſential ingredient ideas, viz. diſobedience and puniſhment.

Hooker, in the beginning of his Eccleſiaſtical Polity, like the learned judge, has with incomparable eloquence interpreted *law* in it's moſt general and comprehenſive ſenſe. And moſt writers who treat *law* as a ſcience, begin with ſuch an explanation. But the Editor, though it may ſeem preſumptuous to queſtion ſuch authority, has thought it his duty to ſuggeſt theſe few obſervations upon the ſignification of the word *law*.

reſtrained,

reſtrained, and gave him alſo the faculty of reaſon to diſcover the purport of thoſe laws.

CONSIDERING the creator only as a being of infinite *power*, he was able unqueſtionably to have preſcribed whatever laws he pleaſed to his creature, man, however unjuſt or ſevere. But as he is alſo a being of infinite *wiſdom*, he has laid down only ſuch laws as were founded in thoſe relations of juſtice, that exiſted in the nature of things antecedent to any poſitive precept. Theſe are the eternal, immutable laws of good and evil, to which the creator himſelf in all his diſpenſations conforms; and which he has enabled human reaſon to diſcover, ſo far as they are neceſſary for the conduct of human actions. Such among others are theſe principles: that we ſhould live honeſtly (2) ſhould hurt nobody, and ſhould render to every one his due; to which three general precepts Juſtinian [a] has reduced the whole doctrine of law.

BUT if the diſcovery of theſe firſt principles of the law of nature depended only upon the due exertion of right reaſon, and could not otherwiſe be obtained than by a chain of metaphyſical diſquiſitions, mankind would have wanted ſome inducement to have quickened their inquiries, and the greater part of the world would have reſted content in mental indolence, and ignorance it's inſeparable companion. As therefore the creator is a being, not only of infinite *power*,

[a] *Juris præcepta ſunt hæc, honeſte vivere, alterum non lædere, ſuum cuique tribuere. Inſt.* I. 1. 3.

(2) It is rather remarkable that both Harris, in his tranſlation of Juſtinian's Inſtitutes, and the learned Commentator, whoſe profound learning and elegant taſte in the claſſics no one will queſtion, ſhould render in Engliſh, *honeſtè vivere*, to live honeſtly.—The language of the Inſtitutes is far too pure to admit of that interpretation; and beſides, our idea of honeſty is fully conveyed by the words *ſuum cuique tribuere*. I ſhould preſume to think that *honeſtè vivere* ſignifies to live honourably, or with decorum, or *bienſeance*; and that this precept was intended to comprize that claſs of duties, of which the violations are ruinous to ſociety, not by immediate but remote conſequences, as drunkenneſs, debauchery, profaneneſs, extravagance, gaming, &c.

and

and *wiſdom*, but alſo of infinite *goodneſs*, he has been pleaſed ſo to contrive the conſtitution and frame of humanity, that we ſhould want no other prompter to inquire after and purſue the rule of right, but only our own ſelf-love, that univerſal principle of action. For he has ſo intimately connected, ſo inſeparably interwoven the laws of eternal juſtice with the happineſs of each individual, that the latter cannot be attained but by obſerving the former; and, if the former be punctually obeyed, it cannot but induce the latter. In conſequence of which mutual connection of juſtice and human felicity, he has not perplexed the law of nature with a [41] multitude of abſtracted rules and precepts, referring merely to the fitneſs or unfitneſs of things, as ſome have vainly ſurmiſed; but has graciouſly reduced the rule of obedience to this one paternal precept, "that man ſhould purſue his own "true and ſubſtantial happineſs." This is the foundation of what we call ethics, or natural law. For the ſeveral articles into which it is branched in our ſyſtems, amount to no more than demonſtrating, that this or that action tends to man's real happineſs, and therefore very juſtly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is deſtructive of man's real happineſs, and therefore that the law of nature forbids it.

THIS law of nature, being coeval with mankind and dictated by God himſelf, is of courſe ſuperior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this (3); and ſuch of them as are valid derive all their

(3) Lord chief juſtice Hobart has alſo advanced, that even an act of parliament made againſt natural juſtice, as to make a man a judge in his own cauſe, is void in itſelf, for *jura naturæ ſunt immutabilia*, and they are *leges legum*. (Hob. 87.) With deference to theſe high authorities, I ſhould conceive that in no caſe whatever can a judge oppoſe his own opinion and authority to the clear will and declaration of the legiſlature. His province is to interpret and obey the mandates of the ſupreme power of the ſtate. And if an act of parliament, if we could ſuppoſe ſuch a caſe, ſhould, like the edict

force, and all their authority, mediately or immediately, from this original.

BUT in order to apply this to the particular exigencies of each individual, it is ſtill neceſſary to have recourſe to reaſon: whoſe office it is to diſcover, as was before obſerved, what the law of nature directs in every circumſtance of life; by conſidering, what method will tend the moſt effectually to our own ſubſtantial happineſs. And if our reaſon were always, as in our firſt anceſtor before his tranſgreſſion, clear and perfect, unruffled by paſſions, unclouded by prejudice, unimpaired by diſeaſe or intemperance, the taſk would be pleaſant and eaſy; we ſhould need no other guide but this. But every man now finds the contrary in his own experience; that his reaſon is corrupt, and his underſtanding full of ignorance and error.

THIS has given manifold occaſion for the benign interpoſition of divine providence; which, in compaſſion to the frailty, the imperfection, and the blindneſs of human reaſon,
[42] hath been pleaſed, at ſundry times and in divers manners, to diſcover and enforce it's laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy ſcriptures. Theſe precepts, when revealed, are found upon

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edict of Herod, command all the children under a certain age to be ſlain, the judge ought to reſign his office rather than be auxiliary to it's execution; but it could only be declared void by the ſame legiſlative power by which it was ordained. If the judicial power were competent to decide that an act of parliament was void becauſe it was contrary to natural juſtice, upon an appeal to the houſe of lords this inconſiſtency would be the conſequence, that as judges they muſt declare void, what as legiſlators they had enacted ſhould be valid.

The learned judge himſelf declares in p. 91, "if the parliament "will poſitively enact a thing to be done which is unreaſonable, I "know of no power in the ordinary forms of the conſtitution, that "is veſted with authority to control it."

compariſon

compariſon to be really a part of the original law of nature, as they tend in all their conſequences to man's felicity. But we are not from thence to conclude that the knowlege of theſe truths was attainable by reaſon, in it's preſent corrupted ſtate; ſince we find that, until they were revealed, they were hid from the wiſdom of ages. As then the moral precepts of this law are indeed of the ſame original with thoſe of the law of nature, ſo their intrinſic obligation is of equal ſtrength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral ſyſtem, which is framed by ethical writers, and denominated the natural law. Becauſe one is the law of nature, expreſsly declared ſo to be by God himſelf; the other is only what, by the aſſiſtance of human reaſon, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

UPON theſe two foundations, the law of nature and the law of revelation, depend all human laws; that is to ſay, no human laws ſhould be ſuffered to contradict theſe. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found neceſſary for the benefit of ſociety to be reſtrained within certain limits. And herein it is that human laws have their greateſt force and efficacy; for, with regard to ſuch points as are not indifferent, human laws are only declaratory of, and act in ſubordination to, the former. To inſtance in the caſe of murder: this is expreſſly forbidden by the divine, and demonſtrably by the natural law; and from theſe prohibitions ariſes the true unlawfulneſs of this crime. Thoſe human laws that annex a puniſhment to it, do not at all increaſe it's moral guilt, or ſuperadd any freſh obligation *in foro conſcientiae* to abſtain from [43] it's perpetration. Nay, if any human law ſhould allow or injoin us to commit it, we are bound to tranſgreſs that human law, or elſe we muſt offend both the natural and the divine. But with regard to matters that are in themſelves indifferent, and are not commanded or forbidden by thoſe ſuperior

ſuperior laws; ſuch, for inſtance, as exporting of wool into foreign countries; here the inferior legiſlature has ſcope and opportunity to interpoſe, and to make that action unlawful which before was not ſo.

If man were to live in a ſtate of nature, unconnected with other individuals, there would be no occaſion for any other laws, than the law of nature (4), and the law of God. Neither could any other law poſſibly exiſt: for a law always ſuppoſes ſome ſuperior who is to make it; and in a ſtate of nature we are all equal, without any other ſuperior but him who is the author of our being. But man was formed for ſociety; and, as is demonſtrated by the writers on this ſubject [b], is neither capable of living alone, nor indeed has the courage to do it. However, as it is impoſſible for the whole race of mankind to be united in one great ſociety, they muſt neceſſarily divide into many; and form ſeparate ſtates, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourſe. Hence ariſes a third kind of law to regulate this mutual intercourſe called "the law of nations:" which, as none of theſe ſtates will acknowlege a ſuperiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between theſe ſeveral communities: in the

[b] Puffendorf, *l.* 7. *c.* 1. compared with Barbeyrac's commentary.

(4) The law of nature, or morality, which teaches the duty towards one's neighbour, would ſcarce be wanted in a ſolitary ſtate, where man is unconnected with man. A ſtate of nature, to which the laws of nature, or of morals, more particularly refer, muſt ſignify the ſtate of men when they aſſociate together previous to, or independent of, the inſtitutions of regular government. The ideal equality of men in ſuch a ſtate no more precludes the idea of a law, than the ſuppoſed equality of ſubjects in a republic.—The ſuperior, who would preſcribe and enforce the law in a ſtate of nature, would be the collective force of the wiſe and good, as the ſuperior in a perfect republic is a majority of the people, or the power to which the majority delegate their authority.

conſtruction

conſtruction alſo of which compacts we have no other rule to reſort to, but the law of nature; being the only one to which all the communities are equally ſubject; and therefore the civil law [c] very juſtly obſerves, that *quod naturalis ratio inter omnes homines conſtituit, vocatur jus gentium.*

THUS much I thought it neceſſary to premiſe concerning [44] the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal ſubject of this ſection, municipal or civil law; that is, the rule by which particular diſtricts, communities, or nations are governed; being thus defined by Juſtinian [d], "*jus civile eſt* "*quod quiſque ſibi populus conſtituit.*" I call it *municipal* law, in compliance with common ſpeech; for, though ſtrictly that expreſſion denotes the particular cuſtoms of one ſingle *municipium* or free town, yet it may with ſufficient propriety be applied to any one ſtate or nation, which is governed by the ſame laws and cuſtoms.

MUNICIPAL law, thus underſtood, is properly defined to be "a rule of civil conduct preſcribed by the ſupreme power "in a ſtate, commanding what is right and prohibiting what "is wrong (5)." Let us endeavour to explain its ſeveral properties, as they ariſe out of this definition.

[c] *Ff.* 1. 1. 9. [d] *Inſt.* 1. 2. 1.

(5) Though the learned Judge treats this as a favourite definition, yet when it is examined, it will not perhaps appear ſo ſatisfactory, as the definition of civil or municipal law, or the law of the land, cited above from Juſtinian's Inſtitutes; viz. *Quod quiſque populus ipſe ſibi jus conſtituit, id ipſius proprium civitatis eſt, vocaturque jus civile, quaſi jus proprium ipſius civitatis.*

A municipal law is completely expreſſed by the firſt branch of the definition—"A rule of civil conduct preſcribed by the ſu- "preme power in a ſtate."—And the latter branch, "commanding "what is right and prohibiting what is wrong," muſt either be ſuperfluous, or convey a defective idea of a municipal law; for if right and wrong are referred to the municipal law itſelf, then,

AND, firſt, it is a *rule*: not a tranſient ſudden order from a ſuperior to or concerning a particular perſon; but ſomething permanent, uniform, and univerſal. Therefore a particular act of the legiſlature to confiſcate the goods of Titius, or to attaint him of high treaſon, does not enter into the idea of a municipal law: for the operation of this act is ſpent upon Titius only, and has no relation to the community in general;

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whatever it commands is right, and what it prohibits is wrong, and this clauſe would be inſignificant tautology. But if right and wrong are to be referred to the law of nature, then the definition will become deficient or erroneous; for though the municipal law may ſeldom or never command what is wrong, yet in ten thouſand inſtances it forbids what is right.—It forbids an unqualified perſon to kill a hare or a partridge; it forbids a man to exerciſe a trade without having ſerved ſeven years as an apprentice; it forbids a man to keep a horſe or a ſervant without paying the tax. Now all theſe acts were perfectly right before the prohibition of the municipal law. Though the latter part of Cicero's definition of a law of nature is ſomething ſimilar, yet, when it is conſidered, it will be found to be free from the objections here ſuggeſted. *Lex eſt ſumma ratio inſita à naturâ quæ jubet ea, quæ facienda ſunt prohibetque contraria.* Cic. de Leg. lib. i. c. 6.

The deſcription of law given by Demoſthenes is perhaps the moſt perfect and ſatisfactory that can be conceived: Οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τοῦτο ζητοῦσι. καὶ ἐπειδὰν εὑρεθῇ, κοινὸν τοῦτο πρόσταγμα ἀπεδείχθη, πᾶσιν ἴσον καὶ ὅμοιον. καὶ τοῦτ' ἔστι νόμος, ᾧ πάντας προσήκει πείθεσθαι διὰ πολλά, καὶ μάλισθ', ὅτι πᾶς ἐστι νόμος εὕρημα μὲν καὶ δῶρον θεῶν, δόγμα δ' ἀνθρώπων φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ ἀκουσίων ἁμαρτημάτων, πόλεως δὲ συνθήκη κοινὴ· καθ ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει. "The deſign and object of laws is to aſcertain what is juſt, honourable, and expedient; and when that is diſcovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which, for various reaſons, all are under an obligation to obey, but eſpecially becauſe all law is the invention and gift of Heaven, the reſolution of wiſe men, the correction of every offence, and the general compact of the ſtate; to live in conformity with which is the duty of every individual in ſociety." *Orat. 1. cont. Ariſtogit.*

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it is rather a ſentence than a law. But an act to declare that the crime of which Titius is accuſed ſhall be deemed high treaſon; this has permanency, uniformity, and univerſality, and therefore is properly a *rule.* It is alſo called a *rule*, to diſtinguiſh it from *advice* or *counſel*, which we are at liberty to follow or not, as we ſee proper, and to judge upon the reaſonableneſs or unreaſonableneſs of the thing adviſed: whereas our obedience to the *law* depends not upon *our approbation*, but upon the *maker's will.* Counſel is only matter of perſuaſion, law is matter of injunction; counſel acts only upon the willing, law upon the unwilling alſo.

IT is alſo called a *rule*, to diſtinguiſh it from a *compact* or [45]
agreement; for a compact is a promiſe proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou "ſhalt, or ſhalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conſcience to that of a law; but then the original of the obligation is different. In compacts, we ourſelves determine and promiſe what ſhall be done, before we are obliged to do it; in laws, we are obliged to act without ourſelves determining or promiſing any thing at all. Upon theſe accounts law is defined to be "*a rule.*"

MUNICIPAL law is alſo "a rule *of civil conduct.*" This diſtinguiſhes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but alſo the rule of faith. Theſe regard man as a creature, and point out his duty to God, to himſelf, and to his neighbour, conſidered in the light of an individual. But municipal or civil law regards him alſo as a citizen, and bound to other duties towards his neighbour, than thoſe of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the ſubſiſtence and peace of the ſociety.

IT is likewiſe "a rule *preſcribed.*" Becauſe a bare reſolution, confined in the breaſt of the legiſlator, without manifeſting itſelf by ſome external ſign, can never be properly a law. It is requiſite that this reſolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by univerſal tradition and long practice, which ſuppoſes a previous publication, and is the caſe of the common law of England. It may be notified, *viva voce*, by officers appointed for that purpoſe, as is done with regard to proclamations, and ſuch acts of parliament as are appoint-
[46] ed to be publicly read in churches and other aſſemblies. It may laſtly be notified by writing, printing, or the like; which is the general courſe taken with all our acts of parliament. Yet, whatever way is made uſe of, it is incumbent on the promulgators to do it in the moſt public and perſpicuous manner; not like Caligula, who (according to Dio Caſſius) wrote his laws in a very ſmall character, and hung them upon high pillars, the more effectually to enſnare the people. There is ſtill a more unreaſonable method than this, which is called making of laws *ex poſt facto*; when after an action (indifferent in itſelf) is committed, the legiſlator then for the firſt time declares it to have been a crime, and inflicts a puniſhment upon the perſon who has committed it. Here it is impoſſible that the party could foreſee that an action, innocent when it was done, ſhould be afterwards converted to guilt by a ſubſequent law; he had therefore no cauſe to abſtain from it; and all puniſhment for not abſtaining muſt of conſequence be cruel and unjuſt [e]. All laws ſhould be

[e] Such laws among the Romans were denominated *privilegia* (6), or private laws, of which Cicero (*de leg.* 3. 19. and in his oration *pro domo*, 17.) thus ſpeaks: "*Vetant leges ſacratae, vetant duodecim* "*tabulae, leges privatis hominibus irro-* "*gari; id enim eſt privilegium. Nemo* "*unquam tulit, nihil eſt crudelius, nihil* "*perniciosius, nihil quod minus hanc civi-* "*tas ferre poſſit.*"

(6) An *ex poſt facto* law may be either of a public or of a private nature: and when we ſpeak generally of an *ex poſt facto* law, we perhaps always mean a law which comprehends the whole community.

therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*preſcribed.*" But when this rule is in the uſual manner notified, or preſcribed, it is then the ſubject's buſineſs to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuſe, the laws would be of no effect, but might always be eluded with impunity.

BUT farther: municipal law is "a rule of civil conduct "preſcribed *by the ſupreme power in a ſtate.*" For legiſlature, as was before obſerved, is the greateſt act of ſuperiority that can be exerciſed by one being over another. Wherefore it is requiſite to the very eſſence of a law, that it be made by the ſupreme power. Sovereignty and legiſlature are indeed convertible terms; one cannot ſubſiſt without the other.

THIS will naturally lead us into a ſhort inquiry concerning [47] the nature of ſociety and civil government; and the natural, inherent right that belongs to the ſovereignty of a ſtate, wherever that ſovereignty be lodged, of making and enforcing laws.

THE only true and natural foundations of ſociety are the wants and the fears of individuals. Not that we can believe, with ſome theoretical writers, that there ever was a time when there was no ſuch thing as ſociety either natural or civil; and that, from the impulſe of reaſon, and through a ſenſe of their wants and weakneſſes, individuals met together in a large plain, entered into an original contract, and choſe the talleſt man preſent to be their governor. This notion, of an actually exiſting unconnected ſtate of nature, is too wild to be ſeriouſly admitted: and beſides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preſervation two thouſand years afterwards; both which

munity. The Roman *privilegia* ſeem to correſpond to our bills of attainder, and bills of pains and penalties, which, though in their nature they are *ex poſt facto* laws, yet are ſeldom called ſo.

were effected by the means of ſingle families. Theſe formed the firſt natural ſociety, among themſelves; which, every day extending its limits, laid the firſt though imperfect rudiments of civil or political ſociety: and when it grew too large to ſubſiſt with convenience in that paſtoral ſtate, wherein the patriarchs appear to have lived, it neceſſarily ſubdivided itſelf by various migrations into more. Afterwards, as agriculture increaſed, which employs and can maintain a much greater number of hands, migrations became leſs frequent: and various tribes, which had formerly ſeparated, reunited again; ſometimes by compulſion and conqueſt, ſometimes by accident, and ſometimes perhaps by compact. But though ſociety had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *ſenſe* of their weakneſs and imperfection that *keeps* mankind together; that demonſtrates the neceſſity of this union; and that therefore is the ſolid and natural foundation, as well as the cement of civil ſociety. And this is what we mean by the original contract of ſociety; which, though perhaps in no inſtance it has ever been formally expreſſed at the firſt inſtitution of a ſtate, yet in nature and reaſon muſt always be underſtood and implied,
[48] in the very act of aſſociating together: namely, that the whole ſhould protect all its parts, and that every part ſhould pay obedience to the will of the whole, or, in other words, that the community ſhould guard the rights of each individual member, and that (in return for this protection) each individual ſhould ſubmit to the laws of the community; without which ſubmiſſion of all it was impoſſible that protection could be certainly extended to any.

FOR when civil ſociety is once formed, government at the ſame time reſults of courſe, as neceſſary to preſerve and to keep that ſociety in order. Unleſs ſome ſuperior be conſtituted, whoſe commands and deciſions all the members are bound to obey, they would ſtill remain as in a ſtate of nature, without any judge upon earth to define their ſeveral rights, and redreſs their ſeveral wrongs. But, as all the members which compoſe this ſociety were naturally equal,

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it may be aſked, in whoſe hands are the reins of government to be entruſted? To this the general anſwer is eaſy; but the application of it to particular caſes has occaſioned one half of thoſe miſchiefs, which are apt to proceed from miſguided political zeal. In general, all mankind will agree that government ſhould be repoſed in ſuch perſons, in whom thoſe qualities are moſt likely to be found, the perfection of which is among the attributes of him who is emphatically ſtiled the ſupreme being; the three grand requiſites, I mean of wiſdom, of goodneſs, and of power: wiſdom, to diſcern the real intereſt of the community; goodneſs, to endeavour always to purſue that real intereſt; and ſtrength, or power, to carry this knowlege and intention into action. Theſe are the natural foundations of ſovereignty, and theſe are the requiſites that ought to be found in every well conſtituted frame of government.

How the ſeveral forms of government we now ſee in the world at firſt actually began, is matter of great uncertainty, and has occaſioned infinite diſputes. It is not my buſineſs or intention to enter into any of them. However they began, or by what right ſoever they ſubſiſt, there is and muſt be in all [49] of them a ſupreme, irreſiſtible, abſolute, uncontrolled authority, in which the *jura ſummi imperii*, or the rights of ſovereignty, reſide. And this authority is placed in thoſe hands, wherein (according to the opinion of the founders of ſuch reſpective ſtates, either expreſsly given, or collected from their tacit approbation) the qualities requiſite for ſupremacy, wiſdom, goodneſs, and power, are the moſt likely to be found.

THE political writers of antiquity will not allow more than three regular forms of government; the firſt, when the ſovereign power is lodged in an aggregate aſſembly conſiſting of all the free members of a community, which is called a democracy; the ſecond, when it is lodged in a council, compoſed of ſelect members, and then it is ſtiled an ariſtocracy; the laſt, when it is entruſted in the hands of a ſingle perſon, and then it takes the name of a monarchy. All other ſpecies

of government, they ſay, are either corruptions of, or reducible to, theſe three.

BY the ſovereign power, as was before obſerved, is meant the making of laws; for wherever that power reſides, all others muſt conform to, and be directed by it, whatever appearance the outward form and adminiſtration of the government may put on. For it is at any time in the option of the legiſlature to alter that form and adminiſtration by a new edict or rule, and to put the execution of the laws into whatever hands it pleaſes; by conſtituting one, or a few, or many executive magiſtrates: and all the other powers of the ſtate muſt obey the legiſlative power in the diſcharge of their ſeveral functions, or elſe the conſtitution is at an end.

IN a democracy, where the right of making laws reſides in the people at large, public virtue, or goodneſs of intention, is more likely to be found, than either of the other qualities of government. Popular aſſemblies are frequently fooliſh in their contrivance, and weak in their execution; but generally mean to do the thing that is right and juſt, and have always a degree of patriotiſm or public ſpirit. In [50] ariſtocracies there is more wiſdom to be found, than in the other frames of government; being compoſed, or intended to be compoſed, of the moſt experienced citizens: but there is leſs honeſty than in a republic, and leſs ſtrength than in a monarchy. A monarchy is indeed the moſt powerful of any; for by the entire conjunction of the legiſlative and executive powers all the ſinews of government are knit together, and united in the hand of the prince: but then there is imminent danger of his employing that ſtrength to improvident or oppreſſive purpoſes.

THUS theſe three ſpecies of government have, all of them, their ſeveral perfections and imperfections. Democracies are uſually the beſt calculated to direct the end of a law; ariſtocracies to invent the means by which that end ſhall be obtained; and monarchies to carry thoſe means into execution.

tion. And the antients, as was obſerved, had in general no idea of any other permanent form of government but theſe three: for though Cicero [f] declares himſelf of opinion, "*eſſe optime* "*conſtitutam rempublicam, quae ex tribus generibus illis, regali,* "*optimo, et populari, ſit modice confuſa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a viſionary whim, and one that, if effected, could never be laſting or ſecure [g].

BUT, happily for us of this iſland, the Britiſh conſtitution has long remained, and I truſt will long continue, a ſtanding exception to the truth of this obſervation. For, as with us the executive power of the laws is lodged in a ſingle perſon, they have all the advantages of ſtrength and diſpatch, that are to be found in the moſt abſolute monarchy: and as the legiſlature of the kingdom is entruſted to three diſtinct powers, entirely independent of each other; firſt, the king; ſecondly, the lords ſpiritual and temporal, which is an ariſtocratical aſſembly of perſons ſelected for their piety, their birth, their wiſdom, their valour, or their property; [51] and, thirdly, the houſe of commons, freely choſen by the people from among themſelves, which makes it a kind of democracy; as this aggregate body, actuated by different ſprings, and attentive to different intereſts, compoſes the Britiſh parliament, and has the ſupreme diſpoſal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withſtood by one of the other two; each branch being armed with a negative power, ſufficient to repel any innovation which it ſhall think inexpedient or dangerous.

HERE then is lodged the ſovereignty of the Britiſh conſtitution; and lodged as beneficially as is poſſible for ſociety. For in no other ſhape could we be ſo certain of finding the three great qualities of government ſo well and ſo happily

[f] In his fragments *de rep. l.* 2.

[g] "*Cunctas nationes et urbes populus* "*aut primores, aut ſinguli regunt: de-* "*lecta ex his et conſtituta reipublicae forma* "*laudari facilius quam evenire, vel, ſi eve-* "*nit, haud diuturna eſſe poteſt.*" *Ann. l.* 4.

united.

united. If the ſupreme power were lodged in any one of the three branches ſeparately, we muſt be expoſed to the inconveniences of either abſolute monarchy, ariſtocracy, or democracy; and ſo want two of the three principal ingredients of good polity, either virtue, wiſdom, or power. If it were lodged in any two of the branches; for inſtance, in the king and houſe of lords; our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we ſhould want that circumſpection and mediatory caution, which the wiſdom of the peers is to afford: if the ſupreme rights of legiſlature were lodged in the two houſes only, and the king had no negative upon their proceedings, they might be tempted to incroach upon the royal prerogative, or perhaps to aboliſh the kingly office, and thereby weaken (if not totally deſtroy) the ſtrength of the executive power. But the conſtitutional government of this iſland is ſo admirably tempered and compounded, that nothing can endanger or hurt it, but deſtroying the equilibrium of power between one branch of the legiſlature and the reſt. For if ever it ſhould happen that the independence of any one of the three ſhould be loſt, or that it ſhould become ſubſervient to the views of either of the other two, there would
[52] ſoon be an end of our conſtitution. The legiſlature would be changed from that, which (upon the ſuppoſition of an original contract, either actual or implied) is preſumed to have been originally ſet up by the general conſent and fundamental act of the ſociety: and ſuch a change, however effected, is according to Mr. Locke [h] (who perhaps carries his theory too far) at once an entire diſſolution of the bands of government; and the people are thereby reduced to a ſtate of anarchy, with liberty to conſtitute to themſelves a new legiſlative power.

HAVING thus curſorily conſidered the three uſual ſpecies of government, and our own ſingular conſtitution, ſelected

[h] On government, part 2. § 212.

and

and compounded from them all, I proceed to obſerve, that, as the power of making laws conſtitutes the ſupreme authority, ſo wherever the ſupreme authority in any ſtate reſides, it is the right of that authority to make laws; that is, in the words of our definition, *to preſcribe the rule of civil action.* And this may be diſcovered from the very end and inſtitution of civil ſtates. For a ſtate is a collective body, compoſed of a multitude of individuals, united for their ſafety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inaſmuch as political communities are made up of many natural perſons, each of whom has his particular will and inclination, theſe ſeveral wills cannot by any *natural* union be joined together, or tempered and diſpoſed into a laſting harmony, ſo as to conſtitute and produce that one uniform will of the whole. It can therefore be no otherwiſe produced than by a *political* union; by the conſent of all perſons to ſubmit their own private wills to the will of one man, or of one or more aſſemblies of men, to whom the ſupreme authority is entruſted: and this will of that one man, or aſſemblage of men, is in different ſtates, according to their different conſtitutions, underſtood to be *law.*

THUS far as to the *right* of the ſupreme power to make laws; but farther, it is it's *duty* likewiſe. For ſince the reſpective members are bound to conform themſelves to the [53] will of the ſtate, it is expedient that they receive directions from the ſtate declaratory of that it's will. But, as it is impoſſible, in ſo great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the ſtate to eſtabliſh general rules, for the perpetual information and direction of all perſons in all points, whether of poſitive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what abſolute and what relative duties are required at his hands; what is to be eſteemed honeſt, diſhoneſt, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the

benefits of ſociety; and after what manner each perſon is to moderate the uſe and exerciſe of thoſe rights which the ſtate aſſigns him, in order to promote and ſecure the public tranquillity.

FROM what has been advanced, the truth of the former branch of our definition, is (I truſt) ſufficiently evident; that "*municipal law is a rule of civil conduct preſcribed by the ſupreme power in a ſtate.*" I proceed now to the latter branch of it; that it is a rule ſo preſcribed, "*commanding what is right, and prohibiting what is wrong.*"

Now, in order to do this completely, it is firſt of all neceſſary that the boundaries of right and wrong be eſtabliſhed and aſcertained by law. And when this is once done, it will follow of courſe that it is likewiſe the buſineſs of the law, conſidered as a rule of civil conduct, to enforce theſe rights and to reſtrain or redreſs theſe wrongs. It remains, therefore, only to conſider in what manner the law is ſaid to aſcertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

FOR this purpoſe every law may be ſaid to conſiſt of ſeveral parts: one, *declaratory*; whereby the rights to be obſerved, and the wrongs to be eſchewed, are clearly defined and laid
[54] down: another, *directory*; whereby the ſubject is inſtructed and enjoined to obſerve thoſe rights, and to abſtain from the commiſſion of thoſe wrongs: a third, *remedial*; whereby a method is pointed out to recover a man's private rights, or redreſs his private wrongs: to which may be added a fourth, uſually termed the *ſanction*, or *vindicatory* branch of the law; whereby it is ſignified what evil or penalty ſhall be incurred by ſuch as commit any public wrongs, and tranſgreſs or neglect their duty.

WITH regard to the firſt of theſe the *declaratory* part of the municipal law, this depends not ſo much upon the law of

of revelation or of nature, as upon the wiſdom and will of the legiſlator. This doctrine, which before was ſlightly touched, deſerves a more particular explication. Thoſe rights then which God and nature have eſtabliſhed, and are therefore called natural rights, ſuch as are life and liberty, need not the aid of human laws to be more effectually inveſted in every man than they are; neither do they receive any additional ſtrength when declared by the municipal laws to be inviolable. On the contrary, no human legiſlature has power to abridge or deſtroy them, unleſs the owner ſhall himſelf commit ſome act that amounts to a forfeiture. Neither do divine or natural *duties* (ſuch as, for inſtance, the worſhip of God, the maintenance of children, and the like) receive any ſtronger ſanction from being alſo declared to be duties by the law of the land. The caſe is the ſame as to crimes and miſdemeſnors, that are forbidden by the ſuperior laws, and therefore ſtiled *mala in ſe*, ſuch as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legiſlature. For that legiſlature in all theſe caſes acts only, as was before obſerved, in ſubordination to the great lawgiver, tranſcribing and publiſhing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinſically right or wrong.

[55] But, with regard to things in themſelves indifferent, the caſe is entirely altered. Theſe become either right or wrong, juſt or unjuſt, duties or miſdemeſnors, according as the municipal legiſlator ſees proper, for promoting the welfare of the ſociety, and more effectually carrying on the purpoſes of civil life. Thus our own common law has declared, that the goods of the wife do inſtantly upon marriage become the property and right of the huſband; and our ſtatute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature; but are merely created by the law, for the purpoſes of civil ſociety. And ſometimes, where the thing itſelf has it's riſe from the

law of nature, the particular circumſtances and mode of doing it become right or wrong, as the laws of the land ſhall direct. Thus, for inſtance, in civil duties: obedience to ſuperiors is the doctrine of revealed as well as natural religion: but who thoſe ſuperiors ſhall be, and in what circumſtances, or to what degrees they ſhall be obeyed, it is the province of human laws to determine. And ſo, as to injuries or crimes, it muſt be left to our own legiſlature to decide, in what caſes the ſeiſing another's cattle ſhall amount to a treſpaſs or a theft; and where it ſhall be a juſtifiable action, as when a landlord takes them by way of diſtreſs for rent.

THUS much for the *declaratory* part of the municipal law: and the *directory* ſtands much upon the ſame footing; for this virtually includes the former, the declaration being uſually collected from the direction. The law that ſays, "thou "ſhalt not ſteal," implies a declaration that ſtealing is a crime. And we have ſeen [1] that, in things naturally indifferent, the very eſſence of right and wrong depends upon the direction of the laws to do or to omit them.

THE *remedial* part of the law is ſo neceſſary a conſequence of the former two, that laws muſt be very vague and imper-
[56] fect without it. For in vain would rights be declared, in vain directed to be obſerved, if there were no method of recovering and aſſerting thoſe rights, when wrongfully withheld or invaded. This is what we mean properly, when we ſpeak of the protection of the law. When, for inſtance, the *declaratory* part of the law has ſaid, "that the field or inhe-"ritance, which belonged to Titius's father, is veſted by his "death in Titius;" and the directory part has "forbidden "any one to enter on another's property, without the leave "of the owner:" if Gaius after this will preſume to take poſſeſſion of the land, the *remedial part* of the law will then interpoſe it's office; will make Gaius reſtore the poſſeſſion to Titius, and alſo pay him damages for the invaſion.

[1] See page 43.

WITH

WITH regard to the *ſanction* of laws, or the evil that may attend the breach of public duties; it is obſerved, that human legiſlators have for the moſt part choſen to make the ſanction of their laws rather *vindicatory* than *remuneratory*, or to conſiſt rather in puniſhments, than in actual particular rewards. Becauſe, in the firſt place, the quiet enjoyment and protection of all our civil rights and liberties, which are the ſure and general conſequence of obedience to the municipal law, are in themſelves the beſt and moſt valuable of all rewards. Becauſe alſo, were the exerciſe of every virtue to be enforced by the propoſal of particular rewards, it were impoſſible for any ſtate to furniſh ſtock enough for ſo profuſe a bounty. And farther, becauſe the dread of evil is a much more forcible principle of human actions than the proſpect of good [k]. For which reaſons, though a prudent beſtowing of rewards is ſometimes of exquiſite uſe, yet we find that thoſe civil laws, which enforce and enjoin our duty, do ſeldom, if ever, propoſe any privilege or gift to ſuch as obey the law; but do conſtantly come armed with a penalty denounced againſt tranſgreſſors, either expreſsly defining the nature and quantity of the puniſhment, or elſe leaving it to the diſcretion of the judges, and thoſe who are entruſted with the care of putting the laws in execution.

OF all the parts of a law the moſt effectual is the *vindi-* [57]
catory. For it is but loſt labour to ſay, "do this, or avoid "that," unleſs we alſo declare, "this ſhall be the conſe-"quence of your non-compliance." We muſt therefore obſerve that the main ſtrength and force of a law conſiſts in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

LEGISLATORS and their laws are ſaid to *compel* and *oblige*; not that by any natural violence they ſo conſtrain a man, as to render it impoſſible for him to act otherwiſe than as they direct, which is the ſtrict ſenſe of obligation: but becauſe,

[k] Locke, Hum. Und. b. 2. c. 21.

by

by declaring and exhibiting a penalty againſt offenders, they bring it to paſs that no man can eaſily chooſe to tranſgreſs the law; ſince, by reaſon of the impending correction, compliance is in a high degree preferable to diſobedience. And, even where rewards are propoſed as well as puniſhments threatened, the obligation of the law ſeems chiefly to conſiſt in the penalty: for rewards, in their nature, can only *perſuade* and *allure*; nothing is *compulſory* but puniſhment.

IT is true, it hath been holden and very juſtly, by the principal of our ethical writers, that human laws are binding upon men's conſciences. But if that were the only, or moſt forcible obligation, the good only would regard the laws, and the bad would ſet them at defiance. And, true as this principle is, it muſt ſtill be underſtood with ſome reſtriction. It holds, I apprehend, as to *rights*; and that, when the law has determined the field to belong to Titius, it is matter of conſcience no longer to withhold or to invade it. So alſo in regard to *natural duties*, and ſuch offences as are *mala in ſe*: here we are bound in conſcience, becauſe we are bound by ſuperior laws, before thoſe human laws were in being, to perform the one and abſtain from the other. But in relation to thoſe laws which enjoin only *poſitive duties*, and forbid only ſuch things as are not *mala in ſe* but *mala prohibita* merely,
[58] without any intermixture of moral guilt, annexing a penalty to non-compliance[1], here I apprehend conſcience is no farther concerned, than by directing a ſubmiſſion to the penalty, in caſe of our breach of thoſe laws: for otherwiſe the multitude of penal laws in a ſtate would not only be looked upon as an impolitic, but would alſo be a very wicked thing; if every ſuch law were a ſnare for the conſcience of the ſubject. But in theſe caſes the alternative is offered to every man; "either abſtain from this, or ſubmit "to ſuch a penalty:" and his conſcience will be clear, whichever ſide of the alternative he thinks proper to embrace. Thus, by the ſtatutes for preſerving the game, a penalty is denounced againſt every unqualified perſon that kills a hare,

[1] See Vol. II. page 420.

and

and againſt every perſon who poſſeſſes a partridge in Auguſt. And ſo, too, by other ſtatutes, pecuniary penalties are inflicted for exerciſing trades without ſerving an apprenticeſhip thereto, for not burying the dead in woollen, for not performing the ſtatute-work on the public roads, and for innumerable other poſitive miſdemeſnors. Now theſe prohibitory laws do not make the tranſgreſſion a moral offence, or ſin: the only obligation in conſcience is to ſubmit to the penalty, if levied. It muſt however be obſerved, that we are here ſpeaking of laws that are ſimply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compenſation for the civil inconvenience ſuppoſed to ariſe from the offence (7). But where diſobedience to the law involves in it alſo any degree of public miſchief or private injury, there it falls within our former diſtinction, and is alſo an offence againſt conſcience [m].

[m] *Lex pure poenalis obligat tantum ad poenam, non item ad culpam: lex poenalis mixta et ad culpam obligat, et ad poenam.* (Sanderſon *de conſcient. obligat. prael.* viii. § 17. 24.)

(7) This is a doctrine to which the Editor cannot ſubſcribe. It is an important queſtion, and deſerves a more extenſive diſcuſſion than can conveniently be introduced into a note. The ſolution of it may not only affect the quiet of the minds of conſcientious men, but may be the foundation of arguments and deciſions in every branch of the law. To form a true judgment upon this ſubject, it is neceſſary to take into conſideration the nature of moral and poſitive laws. The principle of both is the ſame, viz. utility, or the general happineſs and true intereſts of mankind,

Atque ipſa utilitas juſti prope mater et aequi.

But the neceſſity of one ſet of laws is ſeen prior to experience; of the other, poſterior. A moral rule is ſuch, that every man's reaſon (if not perverted) dictates it to him as ſoon as he aſſociates with other men. It is univerſal, and muſt be the ſame in every part of the world. Do not kill, do not ſteal, do not violate promiſes, muſt be equally obligatory in England, Lapland, Kamtſchatka,

I HAVE now gone through the definition laid down of a municipal law; and have ſhewn that it is "a rule—of civil "conduct—preſcribed—by the ſupreme power in a ſtate—

and New Holland. But a poſitive law is diſcovered by experience to be uſeful and neceſſary only to men in certain diſtricts, or under peculiar circumſtances. It is ſaid that it is a capital crime in Holland to kill a ſtork, becauſe that animal deſtroys the vermin which would undermine the dykes or banks, upon which the exiſtence of the country depends. This may be a wiſe law in Holland; but the life of a ſtork in England would probably be of no more value than that of a ſparrow, and ſuch a law would be uſeleſs and cruel in this country.

By the laws of nature and reaſon, every man is permitted to build his houſe in any manner he pleaſes; but from the experience of the deſtructive effects of fire in London, the legiſlature with great wiſdom enacted that all party-walls ſhould be of a certain thickneſs; and it is ſomewhat ſurpriſing that they did not extend this provident act to all other great towns. (14 Geo. 3. c. 78.)

It was alſo diſcovered by experience, that dreadful conſequences enſued, when ſea-faring people, who returned from diſtant countries infected with the plague, were permitted immediately to come on ſhore, and mix with the healthy inhabitants; it was therefore a wiſe and merciful law, though reſtrictive of natural right and liberty, which compelled ſuch perſons to be purified from all contagion by performing quarantine. (4 Vol. 161.)

He who, by the breach of theſe poſitive laws, introduces conflagration and peſtilence, is ſurely guilty of a much greater crime than he is who deprives another of his purſe or his horſe.

The laws againſt ſmuggling are entirely *juris poſitivi*; but the criminality of actions can only be meaſured by their conſequences; and he who ſaves a ſum of money by evading the payment of a tax, does exactly the ſame injury to ſociety as he who ſteals ſo much from the treaſury; and is therefore guilty of as great immorality, or as great an act of diſhoneſty. Or ſmuggling has been compared to that ſpecies of fraud which a man would practiſe who ſhould join with his friends in ordering a dinner at a tavern, and after the feſtivity and gratifications of the day, ſhould ſteal away, and leave his companions to pay his ſhare of the reckoning.

Puniſhment

"commanding what is right, and prohibiting what is "wrong:" in the explication of which I have endeavoured to interweave a few useful principles, concerning the nature of civil government, and the obligation of human laws. Be-

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Puniſhment or penalties are never intended as an equivalent or a compoſition for the commiſſion of the offence; but they are that degree of pain or inconvenience, which are ſuppoſed to be ſufficient to deter men from introducing that greater degree of inconvenience, which would reſult to the community from the general permiſſion of that act, which the law prohibits. It is no recompence to a man's country for the conſequences of an illegal act, that he ſhould afterwards be whipped, or ſhould ſtand in the pillory, or lie in a gaol. But in poſitive laws, as in moral rules, it is equally falſe that *omnia peccata paria ſunt*. If there are laws, ſuch perhaps as the game-laws, which in the public opinion produce little benefit or no ſalutary effect to ſociety, a conſcientious man will feel perhaps no further regard for the obſervance of them, than from the conſideration that his example may encourage others to violate thoſe laws which are more highly beneficial to the community. Indeed, the laſt ſentence of the learned Judge upon this ſubject, is an anſwer to his own doctrine; for the diſobedience of any law in exiſtence, muſt be preſumed to involve in it either public miſchief or private injury. It is related of Socrates, that he made a promiſe with himſelf to obſerve the laws of his country; but this is nothing more than what every good man ought both to promiſe and to perform: and he ought to promiſe ſtill farther, that he will exert all his power to compel others to obey them. As the chief deſign of eſtabliſhed government is the prevention of crimes and the enforcement of the moral duties of man, obedience to that government neceſſarily becomes one of the higheſt of moral obligations: and the principle of moral and poſitive laws being preciſely the ſame, they become ſo blended, that the diſcrimination between them is frequently difficult or impracticable, or, as the author of the Doctor and Student has expreſſed it with beautiful ſimplicity, "In every law poſitive well-made, is ſomewhat of the law of "reaſon and of the law of God; and to diſcern the law of God "and the law of reaſon from the law poſitive, is very hard." 1 *Dial. c.* 4.

fore I conclude this ſection, it may not be amiſs to add a few obſervations concerning the *interpretation* of laws.

WHEN any doubt aroſe upon the conſtruction of the Roman laws, the uſage was to ſtate the caſe to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legiſlature to decide particular diſputes, is not only endleſs, but affords great room for partiality and oppreſſion. The anſwers of the emperor were called his reſcripts, and theſe had in ſucceeding caſes the force of perpetual laws; though they ought to be carefully diſtinguiſhed, by every rational civilian, from thoſe general conſtitutions, which had only the nature of things for their guide. The emperor Macrinus, as his hiſtorian Capitolinus informs us, had once reſolved to aboliſh theſe reſcripts, and retain only the general edicts: he could not bear that the haſty and crude anſwers of ſuch princes as Commodus and Caracalla ſhould be reverenced as laws. But Juſtinian thought otherwiſe [n], and he has preſerved them all. In like manner the canon laws, or decretal epiſtles of the popes, are all of them reſcripts in the ſtricteſt ſenſe. Contrary to all true forms of reaſoning, they argue from particulars to generals.

THE faireſt and moſt rational method to interpret the will of the legiſlator, is by exploring his intentions at the time when the law was made, by *ſigns* the moſt natural and probable. And theſe ſigns are either the words, the context, the ſubject-matter, the effects and conſequence, or the ſpirit and reaſon of the law. Let us take a ſhort view of them all.

1. WORDS are generally to be underſtood in their uſual and moſt known ſignification; not ſo much regarding the propriety of grammar, as their general and popular uſe. Thus the law mentioned by Puffendorf [o], which forbad a

[n] *Inſt.* 1. 2. 6. [o] L. of N. and N. 5. 12. 3.

layman

layman to *lay-hands* on a prieſt, was adjudged to extend to him, who had hurt a prieſt with a weapon. Again; terms of art, or technical terms, muſt be taken according to the acceptation of the learned in each art, trade, and ſcience: ſo in the act of ſettlement, where the crown of England is limited "to the princeſs Sophia, and the heirs of her body, "being proteſtants," it becomes neceſſary to call in the aſſiſtance of lawyers, to aſcertain the preciſe idea of the words "*heirs of her body;*" which in a legal ſenſe comprise only certain of her lineal deſcendants.

2. IF words happen to be ſtill dubious, we may eſtabliſh their meaning from the *context;* with which it may be of ſingular uſe to compare a word, or a ſentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the conſtruction of an act of parliament. Of the ſame nature and uſe is the compariſon of law with other laws, that are made by the ſame legiſlator, that have ſome affinity with the ſubject, or that expreſsly relate to the ſame point (8). Thus,

(8) It is an eſtabliſhed rule of conſtruction that ſtatutes *in pari materiâ*, or upon the ſame ſubject, muſt be conſtrued with a reference to each other; that is, that what is clear in one ſtatute, ſhall be called in aid to explain what is obſcure and ambiguous in another.—Thus the laſt qualification act to kill game (22 and 23 Car. 2. c. 25.) enacts, "that every perſon not having lands and tene-"ments, or ſome other eſtate of inheritance, of the clear yearly "value of 100*l.* or for life, or having leaſe or leaſes of ninety-nine "years of the clear yearly value of 150*l.*" (except certain perſons) ſhall not be allowed to kill game. Upon this ſtatute a doubt aroſe, whether the words *or for life* ſhould be referred to the 100*l.* or to the 150*l. per annum*. The court of king's bench having looked into the former qualification acts, and having found that it was clear by the firſt qualification act (13 R. 1. ſt. 1. c. 13.) that a layman ſhould have 40*s.* a year, and a prieſt 10*l.* a year, and that by the 1 Ja. c. 27. the qualifications were clearly an eſtate of inheritance of 10*l.* a year, and an eſtate for life of 30*l.* a year,

when the law of England declares murder to be felony without benefit of clergy, we muſt reſort to the ſame law of England to learn what the benefit of clergy is: and when the common law cenſures ſimoniacal contracts, it affords great light to the ſubject to conſider what the canon law has adjudged to be ſimony.

3. As to the *ſubject-matter*, words are always to be underſtood as having a regard thereto; for that is always ſuppoſed to be in the eye of the legiſlator, and all his expreſſions
[61] directed to that end. Thus, when a law of our Edward III. forbids all eccleſiaſtical perſons to purchaſe *proviſions* at Rome, it might ſeem to prohibit the buying of grain and other victual; but when we conſider that the ſtatute was made to repreſs the uſurpations of the papal ſee, and that the nominations to benefices by the pope were called *proviſions*, we ſhall ſee that the reſtraint is intended to be laid upon ſuch proviſions only.

4. As to the *effects* and *conſequence*, the rule is, that where words bear either none, or a very abſurd ſignification, if literally underſtood, we muſt a little deviate from the received ſenſe of them. Therefore the Bolognian law, mentioned by Puffendorf[p], which enacted, "that whoever drew blood in "the ſtreets ſhould be puniſhed with the utmoſt ſeverity," was held after long debate not to extend to the ſurgeon,

[p] *l.* 5. *c.* 12. § 8.

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they preſumed that it ſtill was the intention of the legiſlature to make the yearly value of an eſtate for life greater than that of an eſtate of inheritance, though the ſame proportions were not preſerved; and thereupon decided, that clergymen, and all others poſſeſſed of a life eſtate only, muſt have 150*l.* a year to be qualified to kill game. *Lowndes* v. *Lewis*, *E. T.* 22 *Geo.* 3.

The ſame rule to diſcover the intention of a teſtator is applied to wills, viz. the whole of a will ſhall be taken under conſideration, in order to decypher the meaning of an obſcure paſſage in it.

who opened the vein of a perſon that fell down in the ſtreet with a fit.

5. BUT, laſtly, the moſt univerſal and effectual way of diſcovering the true meaning of a law, when the words are dubious, is by conſidering the *reaſon* and *ſpirit* of it; or the cauſe which moved the legiſlator to enact it. For when this reaſon ceaſes, the law itſelf ought likewiſe to ceaſe with it. An inſtance of this is given in a caſe put by Cicero, or whoever was the author of the treatiſe inſcribed to Herennius[q]. There was a law, that thoſe who in a ſtorm forſook the ſhip, ſhould forfeit all property therein; and that the ſhip and lading ſhould belong entirely to thoſe who ſtaid in it. In a dangerous tempeſt all the mariners forſook the ſhip, except only one ſick paſſenger, who by reaſon of his diſeaſe was unable to get out and eſcape. By chance the ſhip came ſafe to port. The ſick man kept poſſeſſion, and claimed the benefit of the law. Now here all the learned agree, that the ſick man is not within the reaſon of the law; for the reaſon of making it was, to give encouragement to ſuch as ſhould venture their lives to ſave the veſſel: but this is a merit, which he could never pretend to, who neither ſtaid in the [62] ſhip upon that account, nor contributed any thing to its preſervation (9).

FROM this method of interpreting laws, by the reaſon of them, ariſes what we call *equity*; which is thus defined by Grotius[r], "the correction of that, wherein the law (by "reaſon of it's univerſality) is deficient." For ſince in laws all caſes cannot be foreſeen or expreſſed, it is neceſſary, that when the general decrees of the law come to be applied to particular caſes, there ſhould be ſomewhere a power veſted

[q] *l.* 1. *c.* 11. [r] *de æquitate.* § 3.

(9) See a very ſenſible chapter upon the interpretation of laws in general, in Rutherforth's Inſtitutes of Natural Law, b. 2. c. 7.

of defining thoſe circumſtances, which (had they been foreſeen) the legiſlator himſelf would have expreſſed. And theſe are the caſes, which, according to Grotius, "*lex non* "*exacte definit, ſed arbitrio boni viri permittit* (10)."

EQUITY thus depending, eſſentially, upon the particular circumſtances of each individual caſe, there can be no eſtabliſhed rules and fixed precepts of equity laid down, without deſtroying it's very eſſence, and reducing it to a poſitive law. And, on the other hand, the liberty of conſidering all caſes in an equitable light muſt not be indulged too far, leſt thereby we deſtroy all law, and leave the deciſion of every queſtion entirely in the breaſt of the judge. And law, without equity, though hard and diſagreeable, is much more deſirable for the public good, than equity without law; which would make every judge a legiſlator, and introduce moſt infinite confuſion; as there would then be almoſt as many different rules of action laid down in our courts, as there are differences of capacity and ſentiment in the human mind.

(10) The only *equity*, according to this deſcription, which exiſts in our government, either reſides in the king, who can prevent the *ſummum jus* from becoming *ſumma injuria*, by an abſolute or a conditional pardon, or in juries, who determine whether any, or to what extent damages ſhall be rendered. But *equity* as here explained, is by no means applicable to the court of chancery; for the learned Judge has elſewhere truly ſaid, that "the ſyſtem of "our courts of equity is a laboured connected ſyſtem, governed "by eſtabliſhed rules, and bound down by precedents, from "which they do not depart, although the reaſon of ſome of them "may perhaps be liable to objection." 3 Vol. 432.

SECTION THE THIRD.

OF THE LAWS OF ENGLAND.

THE municipal law of England, or the rule of civil conduct preſcribed to the inhabitants of this kingdom, may with ſufficient propriety be divided into two kinds: the *lex non ſcripta*, the unwritten, or common law; and the *lex ſcripta*, the written, or ſtatute law.

THE *lex non ſcripta*, or unwritten law, includes not only *general cuſtoms*, or the common law properly ſo called; but alſo the *particular cuſtoms* of certain parts of the kingdom; and likewiſe thoſe *particular laws*, that are by cuſtom obſerved only in certain courts and juriſdictions.

WHEN I call theſe parts of our law *leges non ſcriptae*, I would not be underſtood as if all thoſe laws were at preſent merely *oral*, or communicated from the former ages to the preſent ſolely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overſpread the whole weſtern world, all laws were entirely traditional, for this plain reaſon, becauſe the nations among which they prevailed had but little idea of writing. Thus the Britiſh as well as the Gallic druids committed all their laws as well as learning to memory[a]; and it is ſaid of the primitive Saxons here, as well as their brethren on the continent, that *leges ſola memoria et uſu retinebant*[b]. But, with us at preſent, the monuments and evidences of our legal cuſtoms are contained in the records of the ſeveral courts of juſtice, in books of

[a] Caeſ. *de B. G. lib.* 6. *c.* 13. [b] Spelm. *Gl.* 362.

reports

reports and judicial deciſions, and in the treatiſes of learned ſages of the profeſſion, preſerved and handed down to us from the times of higheſt antiquity. However, I therefore ſtile theſe parts of our law *leges non ſcriptae*, becauſe their original inſtitution and authority are not ſet down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial uſage, and by their univerſal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non ſcriptum* to be that, which is "*tacito et illiterato hominum conſenſu et moribus expreſſum.*"

OUR antient lawyers, and particularly Forteſcue [c], inſiſt with abundance of warmth, that theſe cuſtoms are as old as the primitive Britons, and continued down, through the ſeveral mutations of government and inhabitants, to the preſent time, unchanged and unadulterated. This may be the caſe as to ſome: but in general, as Mr. Selden in his notes obſerves, this aſſertion muſt be underſtood with many grains of allowance; and ought only to ſignify, as the truth ſeems to be, that there never was any formal exchange of one ſyſtem of laws for another: though doubtleſs by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they muſt have inſenſibly introduced and incorporated many of their own cuſtoms with thoſe that were before eſtabliſhed: thereby in all probability improving the texture and wiſdom of the whole, by the accumulated wiſdom of divers particular countries. Our laws, ſaith lord Bacon [d], are mixed as our language: and as our language is ſo much the richer, the laws are the more complete.

AND indeed our antiquaries and early hiſtorians do all poſitively aſſure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local cuſtoms of the ſeveral provinces of the kingdom were grown ſo various, that he found it expedient to compile his *dome-book*, or *liber judicialis*, for the general uſe of the whole king-

[c] c. 17. [d] See his propoſals for a digeſt.

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dom. This book is ſaid to have been extant ſo late as the reign of king Edward the fourth, but is now unfortunately loſt. It contained, we may probably ſuppoſe, the principal maxims of the common law, the penalties for miſdemeſnors, and the forms of judicial proceedings. Thus much may at leaſt be collected from that injunction to obſerve it, which we find in the laws of king Edward the elder, the ſon of Alfred[e]. "*Omnibus qui reipublicae praeſunt etiam atque etiam* "*mando, ut omnibus aequos ſe praebeant judices, perinde ac in* "*judiciali libro (Saxonice,* dom-bec) *ſcriptum habetur: nec* "*quicquam formident quin jus commune (Saxonice,* folcryhte) "*audacter libereque dicant.*"

BUT the irruption and eſtabliſhment of the Danes in England, which followed ſoon after, introduced new cuſtoms, and cauſed this code of Alfred in many provinces to fall into diſuſe: or at leaſt to be mixed and debaſed with other laws of a coarſer alloy. So that about the beginning of the eleventh century there were three principal ſyſtems of laws prevailing in different diſtricts. 1. The *Mercen-Lage*, or Mercian laws, which were obſerved in many of the midland counties, and thoſe bordering on the principality of Wales, the retreat of the antient Britons; and therefore very probably intermixed with the Britiſh or Druidical cuſtoms. 2. The *Weſt-Saxon-Lage*, or laws of the Weſt Saxons, which obtained in the counties to the ſouth and weſt of the iſland, from Kent to Devonſhire. Theſe were probably much the ſame with the laws of Alfred above-mentioned, being the municipal law of the far moſt conſiderable part of his dominions, and particularly including Berkſhire, the ſeat of his peculiar reſidence. 3. The *Dane-Lage*, or Daniſh law, the very name of which ſpeaks it's original and compoſition. This was principally maintained in the reſt of the midland counties, and alſo on the eaſtern coaſt, the part moſt expoſed to the viſits of that piratical people. As for the very northern provinces, they were at that time under a diſtinct government[f].

[e] c. 2. [f] Hal. Hiſt. 59.

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OUT of these three laws, Roger Hoveden[g] and Ranulphus Cestrensis[h] inform us, king Edward the confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle[i] assure us likewise, that this work was projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs. As in Portugal, under king Edward, about the beginning of the fifteenth century[k]. In Spain, under Alonzo X, who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas*[l]. And in Sweden, about the same æra; when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England[m].

BOTH these undertakings, of king Edgar and Edward the confessor, seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested. For Alfred is generally stiled by the same historians the *legum Anglicanarum conditor*, as Edward the confessor is the *restitutor*. These however are the laws which our histories so often mention under the name of the laws of Edward the confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws, that so vigorously with-

[g] *in Hen. II.*
[h] *in Edw. Confessor.*
[i] *in Seld. ad Eadmer.* 6.
[k] Mod. Un. Hist. xxii. 135.
[l] *Ibid.* xx. 211.
[m] *Ibid.* xxxiii. 26. 58.

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ſtood the repeated attacks of the civil law; which eſtabliſhed in the twelfth century a new Roman empire over moſt of the ſtates of the continent: ſtates that have loſt, and perhaps upon that account, their political liberties; while the free conſtitution of England, perhaps upon the ſame account, has been rather improved than debaſed. Theſe, in ſhort, are the laws which gave riſe and original to that collection of maxims and cuſtoms, which is now known by the name of the common law. A name either given to it, in contradiſtinction to other laws, as the ſtatute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune* or *folcright* mentioned by king Edward the elder, after the abolition of the ſeveral provincial cuſtoms and particular laws before-mentioned.

BUT though this is the moſt likely foundation of this collection of maxims and cuſtoms, yet the maxims and cuſtoms, ſo collected, are of higher antiquity than memory or hiſtory can reach (1); nothing being more difficult than to aſcertain the preciſe beginning and firſt ſpring of an antient and long eſtabliſhed cuſtom. Whence it is that in our law the goodneſs of a cuſtom depends upon it's having been uſed time out of mind; or, in the ſolemnity of our legal phraſe, time whereof the memory of man runneth not to the contrary (2). This it is that gives it it's weight and authority: and of this nature are the maxims and cuſtoms which compoſe the common law, or *lex non ſcripta*, of this kingdom.

THIS unwritten, or common, law is properly diſtinguiſhable into three kinds: 1. General cuſtoms; which are the univerſal rule of the whole kingdom, and form the common law, in it's ſtricter and more uſual ſignification. 2. Parti-

(1) What lord Hale ſays is undoubtedly true, that "the original of the common law is as undiſcoverable as the head of the "Nile." Hiſt. Com. Law, 55.

(2) See note 10, p. 76.

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cular cuſtoms: which for the moſt part affect only the inhabitants of particular diſtricts. 3. Certain particular laws, which by cuſtom are adopted and uſed by ſome particular courts, of pretty general and extenſive juriſdiction.

[68] I. As to general cuſtoms, or the common law, properly ſo called; this is that law, by which proceedings and determinations in the king's ordinary courts of juſtice are guided and directed. This, for the moſt part, ſettles the courſe in which lands deſcend by inheritance; the manner and form of acquiring and transferring property; the ſolemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the reſpective remedies of civil injuries; the ſeveral ſpecies of temporal offences, with the manner and degree of puniſhment; and an infinite number of minuter particulars, which diffuſe themſelves as extenſively as the ordinary diſtribution of common juſtice requires. Thus, for example, that there ſhall be four ſuperior courts of record, the chancery, the king's bench, the common pleas, and the exchequer;—that the eldeſt ſon alone is heir to his anceſtor;—that property may be acquired and transferred by writing;—that a deed is of no validity unleſs ſealed and delivered;—that wills ſhall be conſtrued more favourably, and deeds more ſtrictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and puniſhable by fine and impriſonment;—all theſe are doctrines that are not ſet down in any written ſtatute or ordinance, but depend merely upon immemorial uſage, that is, upon common law, for their ſupport.

Some have divided the common law into two principal grounds or foundations: 1. Eſtabliſhed cuſtoms; ſuch as that, where there are three brothers, the eldeſt brother ſhall be heir to the ſecond, in excluſion of the youngeſt: and 2. Eſtabliſhed rules and maxims: as, "that the king can "do no wrong, that no man ſhall be bound to accuſe him-"ſelf," and the like. But I take theſe to be one and the ſame thing. For the authority of theſe maxims reſts entirely upon general reception and uſage: and the only method

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of proving, that this or that maxim is a rule of the common law, is by ſhewing that it hath been always the cuſtom to obſerve it.

[69] But here a very natural, and very material, queſtion ariſes: how are theſe cuſtoms or maxims to be known, and by whom is their validity to be determined? The anſwer is, by the judges in the ſeveral courts of juſtice. They are the depoſitaries of the laws; the living oracles, who muſt decide in all caſes of doubt, and who are bound by an oath to decide according to the law of the land. Their knowlege of that law is derived from experience and ſtudy; from the "*viginti annorum lucubrationes*," which Forteſcue [n], mentions; and from being long perſonally accuſtomed to the judicial deciſions of their predeceſſors. And indeed theſe judicial deciſions are the principal and moſt authoritative evidence, that can be given, of the exiſtence of ſuch a cuſtom as ſhall form a part of the common law. The judgment itſelf, and all the proceedings previous thereto, are carefully regiſtered and preſerved, under the name of *records*, in public repoſitories ſet apart for that particular purpoſe; and to them frequent recourſe is had, when any critical queſtion ariſes, in the determination of which former precedents may give light or aſſiſtance. And therefore, even ſo early as the conqueſt, we find the "*praeteritorum memoria eventorum*" reckoned up as one of the chief qualifications of thoſe, who were held to be "*legibus patriae optime inſtituti* [o]." For it is an eſtabliſhed rule to abide by former precedents, where the ſame points come again in litigation: as well to keep the ſcale of juſtice even and ſteady, and not liable to waver with every new judge's opinion; as alſo becauſe the law in that caſe being ſolemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breaſt of any ſubſequent judge to alter or vary from, according to his private ſentiments: he being ſworn to determine, not according to his own private judgment, but

[n] *cap.* 8. [o] Seld. review of Tith. c. 8.

according

according to the known laws and cuſtoms of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is moſt evidently contrary to reaſon; [70] much more if it be clearly contrary to the divine law. But even in ſuch caſes the ſubſequent judges do not pretend to make a new law, but to vindicate the old one from miſrepreſentation. For if it be found that the former deciſion is manifeſtly abſurd or unjuſt (3), it is declared, not that ſuch a ſentence was *bad law*, but that it was *not law*; that is, that it is not the eſtabliſhed cuſtom of the realm, as has been erroneouſly determined. And hence it is that our lawyers are with juſtice ſo copious in their encomiums on the reaſon of the common law; that they tell us, that the law is the perfection of reaſon, that it always intends to conform thereto, and that what is not reaſon is not law. Not that the particular reaſon of every rule in the law can at this diſtance of time be always preciſely aſſigned; but it is ſufficient that there be nothing in the rule flatly contradictory to reaſon, and then the

(3) But it cannot be diſſembled that both in our law, and in all other laws, there are deciſions drawn from eſtabliſhed principles and maxims, which are good law, though ſuch deciſions may be both manifeſtly abſurd and unjuſt. But notwithſtanding this, they muſt be religiouſly adhered to by the judges in all courts, who are not to aſſume the characters of legiſlators. It is their province *jus dicere*, and not *jus dare*. Lord Coke, in his enthuſiaſtic fondneſs for the common law, goes farther than the learned Commentator; he lays down, that *argumentum ab inconvenienti plarimum valet in lege*, becauſe *nihil quod eſt inconveniens eſt licitum*. Mr. Hargrave's note upon this is well conceived and expreſſed: "Arguments from "inconvenience certainly deſerve the greateſt attention, and "where the weight of other reaſoning is nearly on an equipoiſe, "ought to turn the ſcale. But if the rule of law is clear and ex"plicit, it is in vain to inſiſt upon inconveniencies; nor can it be "true that nothing, which is inconvenient, is lawful, for that "ſuppoſes in thoſe who make laws a perfection, which the moſt "exalted human wiſdom is incapable of attaining, and would be "an invincible argument againſt ever changing the law." *Harg. Co. Litt.* 66.

law will presume it to be well founded [p]. And it hath been an antient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniencies that have followed the innovation.

THE doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust (4): for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced

[p] Herein agreeing with the civil law, *Ff.* 1. 3. 20, 21. "*Non omnium, quae a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum, quae constituuntur, inquiri non oportet: alioquin multa ex his, quae certa sunt, subvertuntur.*"

(4) Precedents and rules must be followed even when they are flatly absurd and unjust, if they are agreeable to antient principles. If an act of parliament had been brought in at the close of a session, and passed on the last day, which made an innocent act criminal, or even a capital crime; and if no day was fixed for the commencement of its operation, it had the same efficacy as if it had been passed on the first day of the session, and all, who, during a long session, had been doing an act, which at the time was legal and inoffensive, were liable to suffer the punishment prescribed by the statute. (4 *Inst.* 25. 4 *Term Rep.* 660.) This was both flatly absurd and unjust; but it was the clear law of England, and could only be abrogated by the united authority of the king, lords, and commons, in parliament assembled; who by the 33 Geo. 3. c. 13. enacted, that when the operation of an act of parliament is not directed to commence from any time specified within it, the clerk of the parliaments shall endorse upon it the day upon which it receives the royal assent, and that day shall be the date of it's commencement. Many other similar instances might be adduced.

by judicial deciſions; and therefore can never be departed from by any modern judge without a breach of his oath, and
[71] the law. For herein there is nothing repugnant to natural juſtice (5); though the artificial reaſon of it, drawn from the feodal law, may not be quite obvious to every body. And therefore, though a modern judge, on account of a ſuppoſed hardſhip upon the half brother, might wiſh it had been otherwiſe ſettled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and ſeize any lands that were purchaſed by his younger brother, no ſubſequent judges would ſcruple to declare that ſuch prior determination was unjuſt, was unreaſonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the ſame thing; ſince it ſometimes may happen that the judge may *miſtake* the law. Upon the whole however, we may take it as a general rule, "that the deci-"ſions of courts of juſtice are the evidence of what is com-"mon law:" in the ſame manner as, in the civil law, what the emperor had once determined was to ſerve for a guide for the future [q].

THE deciſions therefore of courts are held in the higheſt regard, and are not only preſerved as authentic records in the

q "*Si imperialis majeſtas cauſam cognitionaliter examinaverit, et partibus, coram conſtitutis ſententiam dixerit, omnes omnino judices, qui ſub noſtro imperio ſunt, ſciant hanc eſſe legem, non ſolum illi cauſae pro qua producta eſt, ſed et in omnibus ſimilibus.*" C. 1. 14. 12.

(5) But it is certainly repugnant to natural reaſon, where a father leaves two ſons by two different mothers, and dies inteſtate, and a large eſtate deſcends to his eldeſt ſon, who dies a minor or inteſtate, that this eſtate ſhould go to the lord of the manor or to the king, rather than to the younger ſon. When ſuch a caſe happens in the family of a nobleman, or a man of great landed property, this law will then probably appear ſo abſurd and unreaſonable, that it will not be ſuffered to remain long afterwards a reproach to our ſyſtem of juriſprudence. See vol. ii. p. 231.

treaſuries

treaſuries of the ſeveral courts, but are handed out to public view in the numerous volumes of *reports* which furniſh the lawyer's library. Theſe reports are hiſtories of the ſeveral caſes, with a ſhort ſummary of the proceedings, which are preſerved at large in the record; the arguments on both ſides and the reaſons the court gave for it's judgment; taken down in ſhort notes by perſons preſent at the determination. And theſe ſerve as indexes to, and alſo to explain, the records; which always, in matters of conſequence and nicety, the judges direct to be ſearched. The reports are extant in a regular ſeries from the reign of king Edward the ſecond inclusive; and from his time to that of Henry the eighth were taken by the prothonotaries, or chief ſcribes of the [72] court, at the expenſe of the crown, and publiſhed *annually*, whence they are known under the denomination of the *year books*. And it is much to be wiſhed that this beneficial cuſtom had, under proper regulations, been continued to this day: for, though king James the firſt at the inſtance of lord Bacon appointed two reporters[r] with a handſome ſtipend for this purpoſe, yet that wiſe inſtitution was ſoon neglected, and from the reign of Henry the eighth to the preſent time this taſk has been executed by many private and contemporary hands; who ſometimes through haſte and inaccuracy, ſometimes through miſtake and want of ſkill, have publiſhed very crude and imperfect (perhaps contradictory) accounts of one and the ſame determination. Some of the moſt valuable of the antient reports are thoſe publiſhed by lord chief juſtice Coke; a man of infinite learning in his profeſſion, though not a little infected with the pedantry and quaintneſs of the times he lived in, which appear ſtrongly in all his works. However his writings are ſo highly eſteemed, that they are generally cited without the author's name[s].

[r] *Pat.* 15 *Jac. I. p.* 18. 17 Rym. 26.

[s] His reports, for inſtance, are ſtiled, κατ' ἐξοχην, *the reports*; and in quoting them we uſually ſay, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are alſo cited in a peculiar manner, by the name of thoſe princes, in whoſe reigns

BESIDES theſe reporters, there are alſo other authors, to whom great veneration and reſpect is paid by the ſtudents of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with ſome others of antient date; whoſe treatiſes are cited as authority, and are evidence that caſes have formerly happened in which ſuch and ſuch points were determined, which are now become ſettled and firſt principles. One of the laſt of theſe methodical writers in point of time, whoſe works are of any intrinſic authority in the courts of juſtice, and do not entirely depend on the ſtrength of their quotations from older authors, is the ſame learned judge we have juſt mentioned, ſir Edward Coke; who hath written four volumes of inſtitutes, as he is pleaſed to call them, though they have little of the inſtitu-
[73] tional method to warrant ſuch a title. The firſt volume is a very extenſive comment upon a little excellent treatiſe of tenures, compiled by judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the antient reports and year books, but greatly defective in method[s]. The ſecond volume is a comment upon many old acts of parliament, without any ſyſtematical order; the third a more methodical treatiſe of the pleas of the crown; and the fourth an account of the ſeveral ſpecies of courts[t].

AND thus much for the firſt ground and chief corner ſtone of the laws of England, which is general immemorial cuſtom, or common law, from time to time declared in the deciſions of the courts of juſtice; which deciſions are preſerved among our public records, explained in our reports, and digeſted

the caſes reported in his three volumes were determined; *viz.* queen Elizabeth, king James, and king Charles the firſt; as well as by the number of each volume. For ſometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

[s] It is uſually cited either by the name of Co. Litt. or as 1 Inſt.

[t] Theſe are cited as 2, 3, or 4 Inſt. without any author's name. An honorary diſtinction, which, we obſerved, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

for general uſe in the authoritative writings of the venerable ſages of the law.

THE Roman law, as practiſed in the times of its liberty, paid alſo a great regard to cuſtom; but not ſo much as our law: it only then adopting it, when the written law was deficient. Though the reaſons alleged in the digeſt [u] will fully juſtify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For ſince, ſays Julianus, the written law binds us for no "other reaſon but becauſe it is approved by the judgment of "the people, therefore thoſe laws which the people have ap- "proved without writing ought alſo to bind every body. For "where is the difference, whether the people declare their [74] "aſſent to a law by ſuffrage, or by a uniform courſe of act- "ing accordingly?" Thus did they reaſon while Rome had ſome remains of her freedom; but, when the imperial tyranny came to be fully eſtabliſhed, the civil laws ſpeak a very different language. "*Quod principi placuit*(6)*legis habet vigorem,* "*cum populus ei et in eum omne ſuum imperium et poteſtatem con-*

[u] *Ff.* 1. 3. 32.

(6) This is the firſt ſentence of the definition of a conſtitution in the beginning of the Inſtitutes. It ought to be cited at length, that it may receive the execration it deſerves. It is no wonder from this ſpecimen, that the civil law ſhould have experienced ſuch protection and patronage from all the deſpotic governments of Europe, and ſuch oppoſition and deteſtation from the ſturdy Engliſh barons.

CONSTITUTIO.

Sed et quod principi placuit, legis habet vigorem: quum lege regia, quæ de ejus imperio lata eſt, populus ei, et in eum omne imperium ſuum et poteſtatem concedat. Quodcunque ergo imperator per epiſtolam conſtituit; vel cognoſcens decrevit, vel edicto præcepit, legem eſſe conſtat; hæc ſunt, quæ conſtitutiones appellantur. Planè ex his quædam ſunt perſonales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult, nam quod alicui ob meritum indulſit, vel ſi quam pœnam irrogavit, vel ſi cui ſine exemplo ſubvenit, perſonam non tranſgreditur. Alia autem, quum generales ſint, omnes procul dubio tenent. Inſt. 1, 2. 6.

"*ferat*," ſays Ulpian [w]. "*Imperator ſolus et conditor et interpres legis exiſtimatur*," ſays the code [x]. And again, "*ſacrilegii inſtar eſt reſcripto principis obviari* [y]." And indeed it is one of the characteriſtic marks of Engliſh liberty, that our common law depends upon cuſtom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary conſent of the people (7).

II. THE ſecond branch of the unwritten laws of England are particular cuſtoms, or laws which affect only the inhabitants of particular diſtricts.

THESE particular cuſtoms, or ſome of them, are without doubt the remains of that multitude of local cuſtoms before-

[w] *Ff.* 1. 4. 1. [x] *C.* 1. 14. 12. [y] *C.* 1. 23. 5.

(7) Lord chief juſtice Wilmot has ſaid, that "the ſtatute law "is the will of the legiſlature in writing; the common law is no- "thing elſe but ſtatutes worn out by time. All our law began by "conſent of the legiſlature, and whether it is new law by uſage "or writing is the ſame thing. (2 *Wilſ.* 348.) And ſtatute law "and common law both originally flowed from the ſame foun- "tain." (*Ib.* 350.) And to the ſame effect lord Hale declares, "that many of thoſe things that we now take for common law, "were undoubtedly acts of parliament, though now not to be "found of record." (*Hiſt. Com. Law*, 66.) Though this is the probable origin of the greateſt part of the common law, yet much of it certainly has been introduced by uſage, even of modern date, which general convenience has adopted. As in the civil law, *ſine ſcripto jus venit, quod uſus approbavit, nam diuturni mores conſenſu utentium comprobati legem imitantur.* (Inſt. 1, 2. 9.) Of this nature in this country is the law of the road, viz. that horſes and carriages ſhould reſpectively keep the left ſide of the road, and conſequently in meeting ſhould paſs each other on the whip hand. This law has not been enacted by ſtatute, and is ſo modern, that perhaps this is the firſt time that it has been noticed in a book of law. But general convenience diſcovered the neceſſity of it, and the judges have ſo far confirmed it, as to declare frequently at niſi prius, that he who diſregards this ſalutary rule is anſwerable in damages for all the conſequences.

mentioned,

mentioned, out of which the common law, as it now ſtands, was collected at firſt by king Alfred, and afterwards by king Edgar and Edward the confeſſor: each diſtrict mutually ſacrificing ſome of it's own ſpecial uſages, in order that the whole kingdom might enjoy the benefit of one uniform and univerſal ſyſtem of laws. But for reaſons that have been now long forgotten, particular counties, cities, towns, manors, and lordſhips, were very early indulged with the privilege of abiding by their own cuſtoms, in contradiſtinction to the reſt of the nation at large: which privilege is confirmed to them by ſeveral acts of parliament [z].

SUCH is the cuſtom of gavelkind in Kent and ſome other parts of the kingdom (though perhaps it was alſo general till the Norman conqueſt) which ordains, among other things, that not the eldeſt ſon only of the father ſhall ſucceed to his [75] inheritance, but all the ſons alike: and that, though the anceſtor be attainted and hanged, yet the heir ſhall ſucceed to his eſtate, without any eſcheat to the lord.—Such is the cuſtom that prevails in divers antient boroughs, and therefore called borough-engliſh, that the youngeſt ſon ſhall inherit the eſtate, in preference to all his elder brothers.—Such is the cuſtom in other boroughs that a widow ſhall be entitled, for her dower, to all her huſband's lands; whereas at the common law ſhe ſhall be endowed of one third part only.—Such alſo are the ſpecial and particular cuſtoms of manors, of which every one has more or leſs, and which bind all the copyhold and cuſtomary tenants that hold of the ſaid manors.—Such likewiſe is the cuſtom of holding divers inferior courts, with power of trying cauſes, in cities and trading towns, the right of holding which, when no royal grant can be ſhewn, depends entirely upon immemorial and eſtabliſhed uſage.—Such, laſtly, are many particular cuſtoms within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All theſe are con-

[z] *Mag. Cart.* 9 Hen. III. c. 9. —— ſt. 1. c. 1.—and 2 Hen. IV. c. 1. 3 Edw. III. ſt. 2. c. 9.—14 Edw. III.

trary to the general law of the land, and are good only by ſpecial uſage; though the cuſtoms of London are alſo confirmed by act of parliament [a].

To this head may moſt properly be referred a particular ſyſtem of cuſtoms uſed only among one ſet of the king's ſubjects, called the cuſtom of merchants or *lex mercatoria*: which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it [b]; being allowed, for the benefit of trade, to be of the utmoſt validity in all commercial tranſactions: for it is a maxim of law, that "*cuilibet in ſua arte credendum eſt* (8)."

THE rules relating to particular cuſtoms regard either the *proof* of their exiſtence; their *legality* when proved; or their uſual method of *allowance*. And firſt we will conſider the rules of *proof*.

[76] As to gavelkind, and borough-engliſh, the law takes particular notice of them [c], and there is no occaſion to prove that

[a] 8 Rep. 126. Cro. Car. 347. [b] Winch. 24. [c] Co. Litt. 175.

(8) The *lex mercatoria*, or the cuſtom of merchants, like the *lex et conſuetudo parliamenti*, deſcribes only a great diviſion of the law of England. The laws relating to bills of exchange, inſurance, and all mercantile contracts, are as much the general law of the land, as the laws relating to marriage or murder. But the expreſſion has frequently led merchants to ſuppoſe, that all their new faſhions and devices immediately become the law of the land: a notion which, perhaps, has been too much encouraged by our courts. Merchants ought to take their law from the courts, and not the courts from merchants: and when the law is found inconvenient for the purpoſes of extended commerce, application ought to be made to parliament for redreſs. This is agreeable to the opinion of Mr. juſtice Foſter, who maintains, that "the cuſtom "of merchants is the general law of the kingdom, and there- "fore ought not to be left to a jury after it has been ſettled by "judicial determinations." 2 *Bur.* 1226.

ſuch

ſuch cuſtoms actually exiſt, but only that the lands in queſtion are ſubject thereto. All other private cuſtoms muſt be particularly pleaded [d], and as well the exiſtence of ſuch cuſtoms muſt be ſhewn, as that the thing in diſpute is within the cuſtom alleged. The trial in both caſes (both to ſhew the exiſtence of the cuſtom, as, "that in the manor of Dale lands "ſhall deſcend only to the heirs male, and never to the "heirs female;" and alſo to ſhew "that the lands in queſtion "are within that manor") is by a jury of twelve men, and not by the judges; except the ſame particular cuſtom has been before tried, determined, and recorded in the ſame court [e].

THE cuſtoms of London differ from all others in point of trial: for, if the exiſtence of the cuſtom be brought in queſtion, it ſhall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth (9) of their recorder [f]; unleſs it be ſuch a cuſtom as the corporation is itſelf intereſted in, as a right of taking toll, &c. for then the law permits them not to certify on their own behalf [g].

WHEN a cuſtom is actually proved to exiſt, the next inquiry is into the *legality* of it; for, if it is not a good cuſtom, it ought to be no longer uſed; "*Malus uſus abolendus eſt*" is

[d] Litt. § 265.
[e] Dr. & St. 1. 10.
[f] Cro. Car. 516.
[g] Hob. 85.

(9) Sir James Burrow has reported the mode by which the recorder certifies the cuſtom with ſuch a degree of accuracy, as to ſpecify which of his four gowns he ſhall wear upon the occaſion. (1 *Bur.* 248.) When a cuſtom has been once certified by the recorder, the judges will take notice of it, and will not ſuffer it to be certified a ſecond time. (*Doug.* 365.) Lord Mansfield nonſuited the plaintiff in an action brought againſt the defendant on the cuſtom of London, for calling the plaintiff a whore, the plaintiff not being able to prove the cuſtom of inflicting a corporal puniſhment, by carting women of that deſcription. But in the city court ſuch an action is maintained, becauſe they take notice of their own cuſtoms without proof. *Ib.*

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an eſtabliſhed maxim of the law [h]. To make a particular cuſtom good, the following are neceſſary requiſites.

1. THAT it have been uſed ſo long, that the memory of man runneth not to the contrary. So that, if any one can ſhew the beginning of it (10), it is no good cuſtom. For which reaſon no cuſtom can prevail againſt an expreſs act of parliament (11); ſince the ſtatute itſelf is a proof of a time when
[77] ſuch a cuſtom did not exiſt [j].

2. IT muſt have been *continued*. Any interruption would cauſe a temporary ceaſing: the revival gives it a new beginning, which will be within time of memory, and thereupon the cuſtom will be void. But this muſt be underſtood with regard to an interruption of the *right*; for an interruption of the *poſſeſſion* only, for ten or twenty years, will not deſtroy the cuſtom [i]. As if the inhabitants of a pariſh have a cuſtomary right of watering their cattle at a certain pool, the cuſtom is not deſtroyed, though they do not uſe it for ten years; it only becomes more difficult to prove: but if the *right* be any how diſcontinued for a day, the cuſtom is quite at an end.

3. IT muſt have been *peaceable*, and acquieſced in; not ſubject to contention and diſpute [k]. For as cuſtoms owe their

[h] Litt. § 212. 4 Inſt. 274.
[i] Co. Litt. 114.
[j] Co. Litt. 113.
[k] *Ibid.*

(10) If any one can ſhew the beginning of it within legal memory, that is, within any time ſince the firſt year of the reign of Richard the firſt, it is not a good cuſtom.

(11) Therefore a cuſtom that every pound of butter ſold in a certain market ſhould weigh 18 ounces is bad, becauſe it is directly contrary to 13 & 14 Car. II. c. 26, which directs, that every pound, throughout the kingdom, ſhall contain 16 ounces. (3 *T. R.* 271.) But there could be no doubt, I conceive, but it would be a good cuſtom to ſell lumps of butter containing 18 ounces; for if it is lawful to ſell a pound, it muſt be ſo to ſell a pound and any aliquot part of one. The inconvenience and deception ariſe from calling that a pound in one place which is not a pound in another.

original to common conſent, their being immemorially diſputed, either at law or otherwiſe, is a proof that ſuch conſent was wanting.

4. CUSTOMS muſt be *reaſonable*[l]; or, rather taken negatively, they muſt not be unreaſonable. Which is not always, as ſir Edward Coke ſays[m], to be underſtood of every unlearned man's reaſon, but of artificial and legal reaſon, warranted by authority of law. Upon which account a cuſtom may be good, though the particular reaſon of it cannot be aſſigned; for it ſufficeth, if no good legal reaſon can be aſſigned againſt it. Thus a cuſtom in a pariſh, that no man ſhall put his beaſts into the common till the third of October, would be good; and yet it would be hard to ſhew the reaſon why that day in particular is fixed upon, rather than the day before or after. But a cuſtom, that no cattle ſhall be put in till the lord of the manor has firſt put in his, is unreaſonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will loſe all their profits[n].

5. CUSTOMS ought to be *certain*. A cuſtom, that lands [78] ſhall deſcend to the moſt worthy of the owner's blood, is void; for how ſhall this worth be determined? but a cuſtom to deſcend to the next male of the blood, excluſive of females, is certain, and therefore good[o]. A cuſtom to pay two pence an acre in lieu of tithes, is good; but to pay ſometimes two pence and ſometimes three pence, as the occupier of the land pleaſes, is bad for it's uncertainty. Yet a cuſtom, to pay a year's improved value for a fine on a copyhold eſtate, is good; though the value is a thing uncertain: for the value may at any time be aſcertained; and the maxim of law is, *id certum eſt, quod certum reddi poteſt* (12).

[l] Litt. § 212.
[m] 1 Inſt. 62.
[n] Co. Copyh. § 33.
[o] 1 Roll. Abr. 565.

(12) A cuſtom, that poor houſekeepers ſhall carry away rotten wood in a chaſe is bad, being too vague and uncertain. 2 *T. R.* 758.

6. CUSTOMS,

6. CUSTOMS, though eſtabliſhed by conſent, muſt be (when eſtabliſhed) *compulſory*; and not left to the option of every man, whether he will uſe them or no. Therefore a cuſtom, that all the inhabitants ſhall be rated toward the maintenance of a bridge, will be good; but a cuſtom, that every man is to contribute thereto at his own pleaſure, is idle and abſurd, and indeed no cuſtom at all.

7. LASTLY, cuſtoms muſt be *conſiſtent* with each other: one cuſtom cannot be ſet up in oppoſition to another. For if both are really cuſtoms, then both are of equal antiquity, and both eſtabliſhed by mutual conſent: which to ſay of contradictory cuſtoms is abſurd. Therefore, if one man preſcribes that by cuſtom he has a right to have windows looking into another's garden; the other cannot claim a right by cuſtom to ſtop up or obſtruct thoſe windows: for theſe two contradictory cuſtoms cannot both be good, nor both ſtand together. He ought rather to deny the exiſtence of the former cuſtom [p].

NEXT, as to the *allowance* of ſpecial cuſtoms. Cuſtoms, in derogation of the common law, muſt be conſtrued ſtrictly (13). Thus, by the cuſtom of gavelkind, an infant of fifteen years
[79] may by one ſpecies of conveyance (called a deed of feoffment) convey away his lands in fee ſimple, or for ever. Yet this cuſtom does not impower him to uſe any other conveyance, or even to leaſe them for ſeven years: for the cuſtom muſt be ſtrictly purſued [q]. And, moreover, all ſpecial cuſtoms muſt

[p] 9 Rep. 58. [q] Co. Cop. § 33.

(13) This rule is founded upon the conſideration, that a variety of cuſtoms in different places upon the ſame ſubject is a general inconvenience; the courts therefore will not admit ſuch cuſtoms but upon the cleareſt proof. So where there is a cuſtom that lands ſhall deſcend to the eldeſt ſiſter, the courts will not extend this cuſtom to the eldeſt niece, or to any other eldeſt female relation, but upon the ſame authority by which the cuſtom between ſiſters is ſupported. 1 *T. R.* 466.

ſubmit

ſubmit to the king's prerogative. Therefore, if the king purchaſes lands of the nature of gavelkind, where all the ſons inherit equally; yet, upon the king's demiſe, his eldeſt ſon ſhall ſucceed to thoſe lands alone[r]. And thus much for the ſecond part of the *leges non ſcriptae*, or thoſe particular cuſtoms which affect particular perſons or diſtricts only.

III. THE third branch of them are thoſe peculiar laws, which by cuſtom are adopted and uſed only in certain peculiar courts and juriſdictions. And by theſe I underſtand the civil and canon laws[s].

IT may ſeem a little improper at firſt view to rank theſe laws under the head of *leges non ſcriptae*, or unwritten laws, ſeeing they are ſet forth by authority in their pandects, their codes, and their inſtitutions; their councils, decrees, and decretals; and enforced by an immenſe number of expoſitions, deciſions, and treatiſes of the learned in both branches of the law. But I do this, after the example of ſir Matthew Hale[s], becauſe it is moſt plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinſic authority; which is the caſe of our written laws, or acts of parliament. They bind not the ſubjects of England, becauſe their materials were collected from popes or emperors; were digeſted by Juſtinian, or declared to be authentic by Gregory. Theſe conſiderations give them no authority here: for the legiſlature of England doth not, nor ever did, recognize any foreign power, as ſuperior or equal to it in this kingdom; or as having the right to give law to any, the meaneſt, of it's ſubjects. But all the ſtrength that either the papal or imperial laws have obtained [80] in this realm (or indeed in any other kingdom in Europe) is only becauſe they have been admitted and received by immemorial uſage and cuſtom in ſome particular caſes, and ſome particular courts; and then they form a branch of the *leges non ſcriptae*, or cuſtomary laws; or elſe, becauſe they are in ſome other caſes introduced by conſent of parliament, and

[r] Co. Litt. 15. [s] Hiſt. C. L. c. 2.

then

then they owe their validity to the *leges ſcriptae*, or ſtatute law. This is expreſsly declared in thoſe remarkable words of the ſtatute 25 Hen. VIII. c. 21. addreſſed to the king's royal majeſty.—" This your grace's realm, recognizing no ſu-
" perior under God but only your grace, hath been and is
" free from ſubjection to any man's laws, but only to ſuch
" as have been deviſed, made, and ordained *within* this realm
" for the wealth of the ſame; or to ſuch other as, by ſuffer-
" ance of your grace and your progenitors, the people of this
" your realm have taken at their free liberty, by their own
" conſent, to be uſed among them; and have bound them-
" ſelves by long uſe and cuſtom to the obſervance of the
" ſame: not as to the obſervance of the laws of any foreign
" prince, potentate, or prelate; but as to the *cuſtomed* and
" antient laws of this realm, originally eſtabliſhed as laws of
" the ſame, by the ſaid ſufferance, conſents, and cuſtom; and
" none otherwiſe."

BY the civil law, abſolutely taken, is generally underſtood the civil or municipal law of the Roman empire, as comprized in the inſtitutes, the code, and the digeſt of the emperor Juſtinian, and the novel conſtitutions of himſelf and ſome of his ſucceſſors. Of which, as there will frequently be occaſion to cite them, by way of illuſtrating our own laws, it may not be amiſs to give a ſhort and general account.

THE Roman law (founded firſt upon the regal conſtitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or ſtatutes enacted by the ſenate or people, the edicts of the prætor, and the *reſponſa prudentum* or opinions of learned lawyers, and laſtly upon the
[81] imperial decrees, or conſtitutions of ſucceſſive emperors) had grown to ſo great a bulk, or, as Livy expreſſes it[t], " *tam im-*
" *menſus aliarum ſuper alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Juſtinian[u]. This was in part remedied by the

[t] *l.* 3. *c.* 34. [u] Taylor's elements of civil law, 17.

collections

collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, *A. D.* 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

THIS consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code, of Theodosius, imperfect. 4. The novels or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy: which accident, concurring with the policy of the Roman ecclesiastics[w], suddenly gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, [82] with which this system of law, more than any other, is now loaded.

THE canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to

[w] See § 1. page 18.

have,

have, the proper juriſdiction over. This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, and the decretal epiſtles and bulles of the holy ſee. All which lay in the ſame diſorder and confuſion as the Roman civil law: till, about the year 1151, one Gratian an Italian monk, animated by the diſcovery of Juſtinian's pandects, reduced the eccleſiaſtical conſtitutions alſo into ſome method, in three books; which he entitled *concordia diſcordantium canonum*, but which are generally known by the name of *decretum Gratiani*. Theſe reached as low as the time of pope Alexander III. The ſubſequent papal decrees, to the pontificate of Gregory IX, were publiſhed in much the ſame method under the auſpices of that pope, about the year 1230, in five books; entitled *decretalia Gregorii noni*. A ſixth book was added by Boniface VIII, about the year 1298, which is called *ſextus decretalium*. The Clementine conſtitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his ſucceſſor John XXII; who alſo publiſhed twenty conſtitutions of his own, called the *extravagantes Joannis*: all which in ſome meaſure anſwer to the novels of the civil law. To theſe have been ſince added ſome decrees of later popes, in five books, called *extravagantes communes*. And all theſe together, Gratian's decree, Gregory's decretals, the ſixth decretal, the Clementine conſtitutions, and the extravagants of John and his ſucceſſors, form the *corpus juris canonici*, or body of the Roman canon law.

BESIDES theſe pontifical collections, which during the times of popery were received as authentic in this iſland, as well as in other parts of Chriſtendom, there is alſo a kind of national canon law, compoſed of *legatine* and *provincial* conſtitutions, and adapted only to the exigencies of this church
[83] and kingdom. The *legatine* conſtitutions were eccleſiaſtical laws, enacted in national ſynods, held under the cardinals Otho and Othobon, legates from pope Gregory IX and pope Clement IV, in the reign of king Henry III, about the years 1220 and 1268. The *provincial* conſtitutions are principally the decrees of provincial ſynods, held under divers archbiſhops

biſhops of Canterbury, from Stephen Langton in the reign of Henry III to Henry Chichele in the reign of Henry V; and adopted alſo by the province of York [x] in the reign of Henry VI. At the dawn of the reformation, in the reign of king Henry VIII, it was enacted in parliament [y] that a review ſhould be had of the canon law; and, till ſuch review ſhould be made, all canons, conſtitutions, ordinances, and ſynodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, ſhould ſtill be uſed and executed. And, as no ſuch review has yet been perfected, upon this ſtatute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been ſolemnly adjudged upon the principles of law and the conſtitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity [z]; whatever regard the clergy may think proper to pay them (14).

THERE are four ſpecies of courts, in which the civil and canon laws are permitted (under different reſtrictions) to be uſed. 1. The courts of the archbiſhops and biſhops, and their derivative officers, uſually called in our law courts chriſtian, *curiae chriſtianitatis*, or the eccleſiaſtical courts. 2. The military

[x] Burn's eccl. law, pref. vili.
[y] Statute 25 Hen. VIII, c. 19; revived and confirmed by 1 Eliz. c. 1.
[z] Stra. 1057.

(14) Lord Hardwicke cites the opinion of lord Holt, and declares it is not denied by any one, that it is very plain all the clergy are bound by the canons confirmed by the king only, but they muſt be confirmed by the parliament to bind the laity. (2 *Atk.* 605.) Hence it has been decided, that, if the archbiſhop of Canterbury grants a diſpenſation to hold two livings diſtant from each other more than thirty miles, no advantage can be taken of it by lapſe or otherwiſe in the temporal courts, for the reſtriction to thirty miles was introduced by a canon made ſince the 25 Hen. VIII. 2 *Bl. Rep.* 968.

courts. 3. The courts of admiralty. 4. The courts of the two univerſities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon cuſtom; corroborated in the latter inſtance by act of parlia-
[84] ment, ratifying thoſe charters which confirm the cuſtomary law of the univerſities. The more minute conſideration of theſe will fall properly under that part of theſe commentaries which treats of the juriſdiction of courts. It will ſuffice at preſent to remark a few particulars relative to them all, which may ſerve to inculcate more ſtrongly the doctrine laid down concerning them [a].

1. AND, firſt, the courts of common law have the ſuperintendency over theſe courts; to keep them within their juriſdictions, to determine wherein they exceed them, to reſtrain and prohibit ſuch exceſs, and (in caſe of contumacy) to puniſh the officer who executes, and in ſome caſes the judge who enforces, the ſentence ſo declared to be illegal.

2. THE common law has reſerved to itſelf the expoſition of all ſuch acts of parliament, as concern either the extent of theſe courts, or the matters depending before them. And therefore, if theſe courts either refuſe to allow theſe acts of parliament, or will expound them in any other ſenſe than what the common law puts upon them, the king's courts at Weſtminſter will grant prohibitions to reſtrain and control them.

3. AN appeal lies from all theſe courts to the king, in the laſt reſort; which proves that the juriſdiction exerciſed in them is derived from the crown of England, and not from any foreign potentate, or intrinſic authority of their own.—And, from theſe three ſtrong marks and enſigns of ſuperiority, it appears beyond a doubt, that the civil and canon laws, though admitted in ſome caſes by cuſtom in ſome courts, are only ſubordinate, and *leges ſub graviori lege*; and that, thus admitted, reſtrained, altered, new-modelled, and amended,

[a] Hale Hiſt. c. 2.

they

they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

LET us next proceed to the *leges scriptae*, the written laws [85] of the kingdom; which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled [b]. The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 Hen. III: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

THE manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes; and of some general rules with regard to their construction [c].

[b] 8 Rep. 20.

[c] The method of citing these acts of parliament is various. Many of our antient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject; as the statutes of Wales and Ireland, the *articuli cleri*, and the *prerogativa regis*. Some are distinguished by their initial words, a method of citing very antient: being used by the Jews in denominating the books of the pentateuch; by the christian church, in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulles; and in short by the whole body of antient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to its numeral order, as, 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute: and

FIRST, as to their ſeveral kinds. Statutes are either *general* or *ſpecial*, *public* or *private*. A general or public act is an univerſal rule, that regards the whole community: and of
[86] this the courts of law are bound to take notice judicially and *ex officio*; without the ſtatute being particularly pleaded, or formally ſet forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being thoſe which only operate upon particular perſons, and private concerns: ſuch as the Romans entitled *ſenatus decreta*, in contradiſtinction to the *ſenatus conſulta*, which regarded the whole community [d]: and of theſe (which are not promulgated with the ſame notoriety as the former) the judges are not bound to take notice, unleſs they be formally ſhewn and pleaded. Thus, to ſhew the diſtinction, the ſtatute 13 Eliz. c. 10. to prevent ſpiritual perſons from making leaſes for longer terms than twenty-one years, or three lives, is a public act; it being a rule preſcribed to the whole body of ſpiritual perſons in the nation: but an act to enable the biſhop of Cheſter to make a leaſe to A. B. for ſixty years, is an exception to this rule; it concerns only the parties and the biſhop's ſucceſſors; and is therefore a private act.

STATUTES alſo are either *declaratory* of the common law, or *remedial* of ſome defects therein (15). Declaratory, where the old cuſtom of the kingdom is almoſt fallen into diſuſe, or become diſputable; in which caſe the parliament has thought proper, *in perpetuum rei teſtimonium*, and for avoiding all

and therefore when two ſeſſions have been held in one year, we uſually mention ſtat. 1. or 2. Thus the bill of rights is cited, as 1 W. & M. ſt. 2. c. 2. ſignifying that it is the ſecond chapter or act, of the ſecond ſtatute, or the laws made in the ſecond ſeſſion of parliament, in the firſt year of king William and queen Mary.

[d] Gravin. *Orig.* 1. § 24.

(15) This diviſion is generally expreſſed by declaratory ſtatutes, and ſtatutes introductory of a new law. Remedial ſtatutes are generally mentioned in contradiſtinction to penal ſtatutes. See note 19. p. 88.

doubts

doubts and difficulties, to declare what the common law is and ever hath been. Thus the ſtatute of treaſons, 25 Edw. III. cap. 2. doth not make any new ſpecies of treaſons; but only, for the benefit of the ſubject, declares and enumerates thoſe ſeveral kinds of offence, which before were treaſon at the common law. Remedial ſtatutes are thoſe which are made to ſupply ſuch defects, and abridge ſuch ſuperfluities, in the common law, as ariſe either from the general imperfection of all human laws, from change of time and circumſtances, from the miſtakes and unadviſed determinations of unlearned (or even learned) judges, or from any other cauſe whatſoever. And this being done, either by enlarging the common law where it was too narrow and circumſcribed, or by reſtraining it where it was too lax and luxuriant, hath occa- [87] ſioned another ſubordinate diviſion of remedial acts of parliament into *enlarging* and *reſtraining* ſtatutes. To inſtance again in the caſe of treaſon. Clipping the current coin of the kingdom was an offence not ſufficiently guarded againſt by the common law: therefore it was thought expedient by ſtatute 5 Eliz. c. 11. to make it high treaſon, which it was not at the common law: ſo that this was an *enlarging* ſtatute (16). At common law alſo ſpiritual corporations might leaſe out their eſtates for any term of years, till prevented by the ſtatute 13 Eliz. before-mentioned: this was therefore a *reſtraining* ſtatute.

SECONDLY, the rules to be obſerved with regard to the conſtruction of ſtatutes are principally theſe which follow.

(16) This ſtatute againſt clipping the coin hardly correſponds with the general notion either of a remedial or an enlarging ſtatute. In ordinary legal language remedial ſtatutes are contradiſtinguiſhed to penal ſtatutes. An enlarging or an enabling ſtatute is one which increaſes, not reſtrains, the power of action; as the 32 Hen. VIII. c. 28. which gave biſhops and all other ſole eccleſiaſtical corporations, except parſons and vicars, a power of making leaſes, which they did not poſſeſs before, is always called an enabling ſtatute. The 13 Eliz. c. 10. which afterwards limited the power of ſpiritual perſons to make leaſes, is on the contrary ſtiled a reſtraining or diſabling ſtatute. See this fully explained by the learned Commentator, 2 Vol. p. 319.

1. THERE are three points to be conſidered in the conſtruction of all remedial ſtatutes; the old law, the miſchief, and the remedy: that is, how the common law ſtood at the making of the act; what the miſchief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this miſchief. And it is the buſineſs of the judges ſo to conſtrue the act, as to ſuppreſs the miſchief and advance the remedy [e]. Let us inſtance again in the ſame reſtraining ſtatute of 13 Eliz. c. 10. By the common law, eccleſiaſtical corporations might let as long leaſes as they thought proper: the miſchief was, that they let long and unreaſonable leaſes, to the impoveriſhment of their ſucceſſors: the remedy applied by the ſtatute was by making void all leaſes by eccleſiaſtical bodies for longer terms than three lives or twenty-one years. Now in the conſtruction of this ſtatute it is held, that leaſes, though for a longer time, if made by a biſhop, are not void during the biſhop's continuance in his ſee; or, if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the ſucceſſor [f]. The miſchief is therefore ſufficiently ſuppreſſed by vacating them after the determination of the intereſt of the grantors; but the leaſes, during their continuance, being not within the miſchief, are not within the remedy.

[88]

2. A STATUTE, which treats of things or perſons of an inferior rank, cannot by any *general words* be extended to thoſe of a ſuperior. So a ſtatute, treating of "deans, pre-"bendaries, parſons, vicars, *and others having ſpiritual pro-"motion,*" is held not to extend to biſhops, though they have ſpiritual promotion; deans being the higheſt perſons named (17), and biſhops being of a ſtill higher order [g].

[e] 3 Rep. 7. Co. Litt. 11. 42. [g] 2 Rep. 46.
[f] Co. Litt. 45. 3 Rep. 60. 10 Rep. 58.

(17) This conſtruction muſt be preſumed to be moſt conformable to the intention of the legiſlature.

3. PENAL,

3. PENAL ſtatutes muſt be conſtrued ſtrictly. Thus the ſtatute 1 Edw. VI. c. 12. having enacted that thoſe who are convicted of ſtealing *horſes* ſhould not have the benefit of clergy, the judges conceived that this did not extend to him that ſhould ſteal but one *horſe* (18), and therefore procured a new act for that purpoſe in the following year [h]. And, to come nearer our own times, by the ſtatute 14 Geo. II. c. 6. ſtealing ſheep, *or other cattle*, was made felony without benefit of clergy. But theſe general words, "or other cattle," being looked upon as much too looſe to create a capital offence, the act was held to extend to nothing but mere ſheep. And therefore, in the next ſeſſions, it was found neceſſary to make another ſtatute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, ſteers, bullocks, heifers, calves, and lambs by name.

4. STATUTES againſt frauds (19) are to be liberally and beneficially expounded. This may ſeem a contradiction to the laſt

[h] 2 & 3 Edw. VI. c. 33. Bac. Elem. c. 12.

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(18) Lord Hale thinks, that the ſcruple of the judges did not merely depend upon the words being in the plural number, becauſe no doubt had ever occurred reſpecting former ſtatutes in the plural number; as, for inſtance, it was enacted by the 32 Hen. VIII. c. 1. that no perſon convicted of burning *any dwelling houſes* ſhould be admitted to clergy. But the reaſon of the difficulty in this caſe was, becauſe the ſtatute of 37 Hen. VIII. c. 8. was expreſsly penned in the ſingular number; *If any man do ſteal any horſe, mare, or filly;* and then this ſtatute thus varying the number, and at the ſame time expreſsly repealing all other excluſions of clergy introduced ſince the beginning of Hen. VIII. it raiſed a doubt, whether it were not intended by the legiſlature to reſtore clergy where only one horſe was ſtolen. 2 *H. P. C.* 365.

(19) Theſe are generally called remedial ſtatutes. And it is a fundamental rule of conſtruction, that penal ſtatutes ſhall be conſtrued ſtrictly, and remedial ſtatutes ſhall be conſtructed liberally. It was one of the laws of the twelve tables of Rome, that whenever there was a queſtion between liberty and ſlavery, the

rule; moſt ſtatutes againſt frauds being in their conſequences penal. But this difference is here to be taken: where the ſtatute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken ſtrictly: but when the ſtatute acts upon the offence, by ſetting aſide the fraudulent tranſaction (20), here it is to be conſtrued liberally. Upon

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preſumption ſhould be on the ſide of liberty. This excellent principle our law has adopted in the conſtruction of penal ſtatutes: for whenever any ambiguity ariſes in a ſtatute introducing a new penalty or puniſhment, the deciſion ſhall be on the ſide of lenity and mercy; or in favour of natural right and liberty: or, in other words, the deciſion ſhall be according to the ſtrict letter in favour of the ſubject. And though the judges in ſuch caſes may frequently raiſe and ſolve difficulties contrary to the intention of the legiſlature, yet no further inconvenience can reſult, than that the law remains as it was before the ſtatute. And it is more conſonant to principles of liberty, that the judge ſhould acquit whom the legiſlator intended to puniſh, than that he ſhould puniſh whom the legiſlator intended to diſcharge with impunity. But remedial ſtatutes muſt be conſtrued according to the ſpirit: for in giving relief againſt fraud, or in the furtherance and extenſion of natural right and juſtice, the judge may ſafely go even beyond that which exiſted in the minds of thoſe who framed the law.

(20) And therefore it has been held, that the ſame words in a ſtatute will bear different interpretations according to the nature of the ſuit or proſecution inſtituted upon them. As by the 9 Ann. c. 14. the ſtatute againſt gaming; if any perſon ſhall loſe at any time or ſitting 10*l.* and ſhall pay it to the winner, he may recover it back within three months; and if the loſer does not within that time, any other perſon may ſue for it, and treble the value beſides. So where an action was brought to recover back fourteen guineas, which had been won and paid after a continuance at play, except an interruption during dinner, the court held the ſtatute was remedial, as far as it prevented the effects of gaming, without inflicting a penalty, and therefore in this action, they conſidered it one time or ſitting; but they ſaid, if an action had been brought by a common informer for the penalty, they would have conſtrued it ſtrictly in favour of the defendant, and would have held, that the money had been loſt at two ſittings. 2 *Bl. Rep.* 1226.

this

this footing the ſtatute of 13 Eliz. c. 5. which avoids all gifts of goods, &c. made to defraud creditors *and others*, was held to extend by the general words to a gift made to defraud the [89] queen of a forfeiture [i].

5. ONE part of a ſtatute muſt be ſo conſtrued by another, that the whole may (if poſſible) ſtand: *ut res magis valeat, quam pereat.* As if land be veſted in the king and his heirs by act of parliament, ſaving the right of A; and A has at that time a leaſe of it for three years: here A ſhall hold it for his term of three years, and afterwards it ſhall go to the king. For this interpretation furniſhes matter for every clauſe of the ſtatute to work and operate upon. But,

6. A SAVING, totally repugnant to the body of the act, is void. If therefore an act of parliament veſts land in the king and his heirs, ſaving the right of all perſons whatſoever; or veſts the land of A in the king, ſaving the right of A: in either of theſe caſes the ſaving is totally repugnant to the body of the ſtatute, and (if good) would render the ſtatute of no effect or operation; and therefore the ſaving is void, and the land veſts abſolutely in the king [k].

7. WHERE the common law and a ſtatute differ, the common law gives place to the ſtatute; and an old ſtatute gives place to a new one. And this upon a general principle of univerſal law, that "*leges poſteriores priores contrarias abrogant:*" conſonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus poſtremum juſſit, id jus ratum eſto.*" But this is to be underſtood, only when the latter ſtatute is couched in negative terms, or where it's matter is ſo clearly repugnant, that it neceſſarily implies a negative. As if a former act ſays, that a juror upon ſuch a trial ſhall have twenty pounds a year; and a new ſtatute afterwards enacts, that he ſhall have twenty marks: here the latter ſtatute, though it does not expreſs, yet neceſſarily implies a negative, and virtually repeals the former.

[i] 3 Rep. 82. [k] 1 Rep. 47.

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For if twenty marks be made qualification ſufficient, the former ſtatute which requires twenty pounds is at an end [l].
[90] But if both acts be merely affirmative, and the ſubſtance ſuch that both may ſtand together, here the latter does not repeal the former, but they ſhall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-ſeſſions, and a latter law makes the ſame offence indictable at the aſſiſes; here the juriſdiction of the ſeſſions is not taken away, but both have a concurrent juriſdiction, and the offender may be proſecuted at either: unleſs the new ſtatute ſubjoins expreſs negative words, as, that the offence ſhall be indictable at the aſſiſes, *and not elſewhere* [m].

8. IF a ſtatute, that repeals another, is itſelf repealed afterwards, the firſt ſtatute is hereby revived, without any formal words for that purpoſe. So when the ſtatutes of 26 and 35 Hen. VIII, declaring the king to be the ſupreme head of the church, were repealed by a ſtatute 1 and 2 Philip and Mary, and this latter ſtatute was afterwards repealed by an act of 1 Eliz. there needed not any expreſs words of revival in queen Elizabeth's ſtatute, but theſe acts of king Henry were impliedly and virtually revived [n].

9. ACTS of parliament derogatory from the power of ſubſequent parliaments bind not. So the ſtatute 11 Hen. VII. c. 1. which directs that no perſon for aſſiſting a king *de facto*, ſhall be attainted of treaſon by act of parliament or otherwiſe, is held to be good only as to common proſecutions for high treaſon; but will not reſtrain or clog any parliamentary attainder [o]. Becauſe the legiſlature, being in truth the ſovereign power, is always of equal, always of abſolute authority: it acknowleges no ſuperior upon earth, which the prior legiſlature muſt have been, if it's ordinances could bind a ſubſequent parliament. And upon the ſame principle Cicero, in his letters to Atticus, treats with a proper con-

[l] Jenk. Cent. 2. 73.
[m] 2. Rep. 63.
[n] 4 Inſt 325.
[o] 4 Inſt. 43.

tempt

tempt theſe reſtraining clauſes, which endeavour to tie up the hands of ſucceeding legiſlatures. "When you repeal the "law itſelf, ſays he, you at the ſame time repeal the prohi- [91] "bitory clauſe, which guards againſt ſuch repeal[p]."

10. LASTLY, acts of parliament that are impoſſible to be performed are of no validity: and if there ariſe out of them collaterally any abſurd conſequences, manifeſtly contradictory to common reaſon, they are, with regard to thoſe collateral conſequences, void (21). I lay down the rule with theſe reſtrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reaſon are void. But if the parliament will poſitively enact a thing to be done which is unreaſonable, I know of no power in the ordinary forms of the conſtitution, that is veſted with authority to control it: and the examples uſually alleged in ſupport of this ſenſe of the rule do none of them prove, that, where the main object of a ſtatute is unreaſonable, the judges are at liberty to reject it; for that were to ſet the judicial power above that of the legiſlature, which would be ſubverſive of all government. But where ſome collateral matter ariſes out of the general words, and happens to be unreaſonable; there the judges are in decency to conclude that this conſequence was not foreſeen by the parliament, and therefore they are at liberty to expound the ſtatute by equity, and only *quoad hoc* diſregard it. Thus if an act of parliament gives a man power to try all cauſes, that ariſe within his manor of Dale; yet, if a cauſe ſhould ariſe in which he himſelf is party, the act is

[p] *Cum lex abrogatur, illud ipſum abrogatur, quo non cum abrogari oportuit. l. 3. ep. 23.*

(21) If an act of parliament is clearly and unequivocally expreſſed, with all deference to the learned Commentator, I conceive it is neither void in it's direct nor collateral conſequences, however abſurd and unreaſonable they may appear. If the expreſſion will admit of doubt, it will not then be preſumed that that conſtruction can be agreeable to the intention of the legiſlature, the conſequences of which are unreaſonable; but where the ſignification of a ſtatute is manifeſt, no authority leſs than that of parliament can reſtrain it's operation.

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conſtrued not to extend to that, becauſe it is unreaſonable that any man ſhould determine his own quarrel[q]. But, if we could conceive it poſſible for the parliament to enact, that he ſhould try as well his own cauſes as thoſe of other perſons, there is no court that has power to defeat the intent of the legiſlature, when couched in ſuch evident and expreſs words, as leave no doubt whether it was the intent of the legiſlature or no.

THESE are the ſeveral grounds of the laws of England: over and above which, equity is alſo frequently called in to
[92] aſſiſt, to moderate, and to explain them. What equity is, and how impoſſible in it's very eſſence to be reduced to ſtated rules, hath been ſhewn in the preceding ſection. I ſhall therefore only add, that (beſides the liberality of ſentiment with which our common law judges interpret acts of parliament, and ſuch rules of the unwritten law as are not of a poſitive kind) there are alſo peculiar courts of equity eſtabliſhed for the benefit of the ſubject; to detect latent frauds and concealments, which the proceſs of the courts of law is not adapted to reach; to enforce the execution of ſuch matters of truſt and confidence, as are binding in conſcience, though not cognizable in a court of law; to deliver from ſuch dangers as are owing to misfortune or overſight; and to give a more ſpecific relief, and more adapted to the circumſtances of the caſe, than can always be obtained by the generality of the rules of the poſitive or common law. This is the buſineſs of our courts of equity, which however are only converſant in matters of property. For the freedom of our conſtitution will not permit, that in criminal caſes a power ſhould be lodged in any judge, to conſtrue the law otherwiſe than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot ſuffer *more* puniſhment than the law aſſigns, but he may ſuffer *leſs*. The laws cannot be ſtrained by partiality to inflict a penalty beyond what the letter will warrant; but, in caſes where the letter induces any apparent hardſhip, the crown has the power to pardon.

[q] 8 Rep. 118.

SECTION THE FOURTH.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

THE kingdom of England, over which our municipal laws have juriſdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local cuſtoms of this territory do now obtain, in part or in all, with more or leſs reſtrictions, in theſe and many other adjacent countries; of which it will be proper firſt to take a review, before we conſider the kingdom of England itſelf, the original and proper ſubject of theſe laws.

WALES had continued independent of England, unconquered and uncultivated, in the primitive paſtoral ſtate which Cæſar and Tacitus aſcribe to Britain in general, for many centuries; even from the time of the hoſtile invaſions of the Saxons, when the ancient and chriſtian inhabitants of the iſland retired to thoſe natural intrenchments, for protection from their pagan viſitants. But when theſe invaders themſelves were converted to chriſtianity, and ſettled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were over-run by little and little, gradually driven from one faſtneſs to another, and by repeated loſſes abridged of their wild independence. Very early in our hiſtory we find their princes doing homage to the crown of England; till at length in the reign of Edward the Firſt, who may juſtly be ſtiled the conqueror of Wales,

Wales, the line of their antient princes was aboliſhed, and the king of England's eldeſt ſon became, as a matter of courſe (1), their titular prince; the territory of Wales being then entirely re-annexed (by a kind of feodal reſumption) to the dominion of the crown of England[a]; or, as the ſtatute (2) of Rhudhlan[b] expreſſes it, *terra Walliae cum incolis ſuis, prius "regi jure feodali ſubjecta*, (of which homage was the ſign) "*jam in proprietatis dominium totaliter et cum integritate con-"verſa eſt, et coronae regni Angliae tanquam pars corporis ejuſ-"dem annexa et unita.*" By the ſtatute alſo of Wales[c] very material alterations were made in divers parts of their laws, ſo as to reduce them nearer to the Engliſh ſtandard, eſpecially in the forms of their judicial proceedings: but they ſtill retained very much of their original polity; particularly their rule of inheritance, viz. that their lands were divided equally among all the iſſue male, and did not deſcend to the eldeſt ſon alone. By other ſubſequent ſtatutes their provincial immunities were ſtill farther abridged: but the finiſhing ſtroke

[a] Vaugh. 400.
[b] 10 Edw. I.
[c] 12 Edw. I.

(1) It cannot be ſaid that the king's eldeſt ſon became prince of Wales by any neceſſary or natural conſequence; but for the origin and creation of his title, ſee p. 224.

(2) The learned Judge has made a miſtake in referring to the ſtatute, which is called the ſtatute of Rutland, in the 10 Ed. I. which does not at all relate to Wales. But the ſtatute of Rutland, as it is called in *Vaughan* (p. 400.) is the ſame as the *Statutum Walliae*. Mr. Barrington, in his Obſervations on the Ancient Statutes, (p. 74.) tells us, that the *Statutum Wallie* bears date *apud Rothelanum*, what is now called Rhuydland in Flintſhire. Though Edward ſays, that *terra Wallie prius regi jure feodali ſubjecta*, yet Mr. Barrington aſſures us, that the feudal law was then unknown in Wales, and that "there are at preſent in North Wales, and it "is believed in South Wales, no copyhold tenures, and ſcarcely "an inſtance of what we call manerial rights; but the property is "entirely free and allodial. Edward, however, was a conqueror, "and he had a right to make uſe of his own words in the pre-"amble to his law." *Ib.* 75.

to

to their independency was given by the ſtatute 27 Hen. VIII. c. 26. which at the ſame time gave the utmoſt advancement to their civil proſperity, by admitting them to a thorough communication of laws with the ſubjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being inſenſibly put upon the ſame footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practiſed with great ſucceſs, till ſhe reduced all Italy to her obedience, by admitting the vanquiſhed ſtates to partake of the Roman privileges.

IT is enacted by this ſtatute 27 Hen. VIII, 1. That the dominion of Wales ſhall be for ever united to the kingdom of England. 2. That all Welſhmen born ſhall have the ſame liberties as other the king's ſubjects. 3. That lands in Wales ſhall be inheritable according to the Engliſh tenures and rules of deſcent. 4. That the laws of England, and no other, ſhall be uſed in Wales: beſides many other regulations of the po- [95]
lice of this principality. And the ſtatute 34 & 35 Hen. VIII. c. 26. confirms the ſame, adds farther regulations, divides it into twelve ſhires (3), and, in ſhort, reduces it into the ſame order in which it ſtands at this day; differing from the kingdom of England in only a few particulars, and thoſe too of the nature of privileges, (ſuch as having courts within itſelf, independent of the proceſs of Weſtminſter-hall,) and ſome other immaterial peculiarities, hardly more than are to be found in many counties of England itſelf.

THE kingdom of Scotland, notwithſtanding the union of the crowns on the acceſſion of their king James VI. to that of England, continued an entirely ſeparate and diſtinct king-

(3) By this union of Wales with England, twenty-ſeven members were added to the Engliſh houſe of commons. By the 27 Hen. VIII. c. 26. the county of Monmouth was enabled to ſend two members to parliament; but the other counties and the towns in Wales repreſented in parliament had the privilege granted of returning one only.

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dom for above a century more, though an union had been long projected; which was judged to be the more eaſy to be done, as both kingdoms were antiently under the ſame government, and ſtill retained a very great reſemblance, though far from an identity, in their laws. By an act of parliament 1 Jac. I. c. 1. it is declared, that theſe two mighty, famous, and antient kingdoms were formerly one. And ſir Edward Coke obſerves [d], how marvellous a conformity there was, not only in the religion and language of the two nations, but alſo in their antient laws, the deſcent of the crown, their parliaments, their titles of nobility, their officers of ſtate and of juſtice, their writs, their cuſtoms, and even the language of their laws. Upon which account he ſuppoſes the common law of each to have been originally the ſame; eſpecially as their moſt antient and authentic book, called *regiam majeſtatem*, and containing the rules of *their* antient common law, is extremely ſimilar to that of Glanvil, which contains the principles of *ours*, as it ſtood in the reign of Henry II. And the many diverſities, ſubſiſting between the two laws at preſent, may be well enough accounted for, from a diverſity of practice in two large and uncommunicating juriſdictions, and from the acts of two diſtinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms (4).

[d] 4 Inſt. 345.

(4) The laws in Scotland concerning the tenures of land, and of conſequence the conſtitution of parliaments and the royal prerogatives, were founded upon the ſame feudal principles as the laws reſpecting theſe ſubjects in England. It is ſaid, that the feudal polity was eſtabliſhed firſt in England; and was afterwards introduced into Scotland in imitation of the Engliſh government. But it continued in it's original form much longer in Scotland than it did in England, and the changes in the Scotch government, probably owing to the circumſtance that they are more recent, are far more diſtinctly marked and defined than they are in the hiſtory of the Engliſh conſtitution. And perhaps the progreſs of the Scotch parliaments affords a clearer elucidation of the

 obſcure

HOWEVER, ſir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but theſe were at length overcome, and the great

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obſcure and ambiguous points in the hiſtory of the repreſentation and conſtitution of our country, than any arguments or authorities that have yet been adduced. But a particular diſcuſſion of this ſubject would far exceed the limits of a note, and will be reſerved for a future occaſion. But for an account of the parliament of Scotland before the union, and of the laws relative to the election of the repreſentative peers and commoners of Scotland, I ſhall refer the ſtudious reader to Mr. Wight's valuable *Inquiry into the Riſe and Progreſs of Parliaments chiefly in Scotland.* (Quarto ed.) It is ſuppoſed, that we owe the lower houſe of parliament in England, to the accidental circumſtance that the barons and the repreſentatives of the counties and boroughs had not a room large enough to contain them all; but in Scotland, the three eſtates aſſembled always in one houſe, had one common preſident, and deliberated jointly upon all matters that came before them, whether of a judicial or of a legiſlative nature. (*Wight*, 82.) In England the lords ſpiritual were always ſtyled one of the three eſtates of the realm; but there is no authority that they ever voted in a body diſtinct from the lords temporal. In the Scotch parliament the three eſtates were, 1. The biſhops, abbots, and other prelates who had a ſeat in parliament, as in England, on account of their benefices, or rather lands, which they held *in capite*, i. e. immediately of the crown: 2. The barons, and the commiſſioners of ſhires, who were the repreſentatives of the ſmaller barons, or the free tenants of the king: 3. The burgeſſes, or the repreſentatives of the royal boroughs. Craig aſſures us, *nihil ratum eſſe, nihil legis vim habere, niſi quod omnium trium ordinum conſenſu conjunctio conſtitutum eſt; ita tamen ut unius cujuſque ordinis per ſe major pars conſentiens pro toto ordine ſufficiat. Scio hodie controverti, an duo ordines diſſentiente tertio, quaſi major pars leges condere poſſint; cujus partem negantem boni omnes, et quicunque de hac re ſcripſerunt pertinaciſſimè tuentur, alioqui duo ordines in everſionem tertii poſſint conſentire.* (De Feudis, lib. i. Dieg. 7. ſ. 11.) But ſome writers have ſince preſumed to controvert this doctrine. (*Wight*, 83.) It is ſtrange that a great fundamental point, which was likely to occur frequently, ſhould remain a ſubject of doubt and controverſy. But we ſhould now be inclined to think, that a majority of one of the eſtates could

work was happily effected in 1707, 6 Anne; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the moſt conſiderable being as follows:

1. THAT on the firſt of May 1707, and for ever after, the kingdoms of England and Scotland ſhould be united into one kingdom, by the name of Great Britain.

2. THE ſucceſſion to the monarchy of Great Britain ſhall be the ſame as was before ſettled with regard to that of England.

3. THE united kingdom ſhall be repreſented by one parliament.

4. THERE ſhall be a communication of all rights and privileges between the ſubjects of both kingdoms, except where it is otherwiſe agreed.

9. WHEN England raiſes 2,000,000 *l.* (5) by a land tax, Scotland ſhall raiſe 48,000 *l.*

16, 17. THE ſtandards of the coin, of weights, and of meaſures, ſhall be reduced to thoſe of England, throughout the united kingdoms.

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not have reſiſted a majority of each of the other two, as it cannot eaſily be ſuppoſed, that a majority of the ſpiritual lords would have conſented to thoſe ſtatutes, which, from the year 1587 to the year 1690, were enacted for their impoveriſhment, and finally for their annihilation. At the time of the union, the Scotch parliament conſiſted only of the other two eſtates. With regard to laws concerning contracts and commerce, and perhaps alſo crimes, the law of Scotland is in a great degree conformable to the civil law; and this, probably, was owing to their frequent alliances and connections with France and the continent, where the civil law chiefly prevailed.

(5) Accurately, 1,997,763 *l.* 8 *s.* 4¼ *d.* the ſum raiſed by a land tax of 4 *s.* in the pound.

18. THE

18. THE laws relating to trade, cuſtoms, and the exciſe, ſhall be the ſame in Scotland as in England. But all the other laws of Scotland ſhall remain in force: though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the diſcretion of the parliament: laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

22. SIXTEEN peers are to be choſen to repreſent the peer- [97]
age of Scotland in parliament, and forty-five members to ſit in the houſe of commons (6).

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(6) By the 25th article it is agreed, that all laws and ſtatutes in either kingdom, ſo far as they are contrary to theſe articles, ſhall ceaſe and become void. From the time of Edw. IV. till the reign of Ch. II. both incluſive, our kings uſed frequently to grant, by their charter only, a right to unrepreſented towns of ſending members to parliament. The laſt time this prerogative was exerciſed, was in the 29 Ch. II. who gave this privilege to Newark; and it is remarkable, that it was alſo the firſt time that the legality of this power was queſtioned in the houſe of commons, but it was then acknowledged by a majority of 125 to 73. (*Comm. Jour. 21 March* 1676-7.) But notwithſtanding it is a general rule in our law, that the king can never be deprived of his prerogatives, but by the clear and expreſs words of an act of parliament; yet it has been thought, from this laſt article in the act of union, that this prerogative of the crown is virtually abrogated, as the exerciſe of it would neceſſarily deſtroy the proportion of the repreſentatives for the two kingdoms. (See 1 *Doug. El. Caſes*, 70. *The Preface to Glanv. Rep. and Simeon's Law of Elect.* 91.) It was alſo agreed, that the mode of the election of the peers and commons ſhould be ſettled by an act paſſed in the parliament of Scotland, which was afterwards recited, ratified, and made part of the act of union. And by that ſtatute it was enacted, that of the 45 commoners, 30 ſhould be elected by the ſhires, and 15 by the boroughs; that the city of Edinburgh ſhould elect one, and that the other royal boroughs ſhould be divided into fourteen diſtricts, and that each diſtrict ſhould return one. It was alſo provided, that no perſon ſhould elect or be elected

23. THE ſixteen peers of Scotland ſhall have all privileges of parliament: and all peers of Scotland ſhall be peers of Great Britain, and rank next after thoſe of the ſame degree at the time of the union, and ſhall have all privileges of peers, except ſitting in the houſe of lords, and voting on the trial of a peer (7).

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one of the 45, but who would have been capable of electing, or of being elected, a repreſentative of a ſhire or a borough to the parliament of Scotland. Hence the eldeſt ſon of any Scotch peer cannot be elected one of the 45 repreſentatives; for by the law of Scotland, prior to the union, the eldeſt ſon of a Scotch peer was incapable of ſitting in the Scotch parliament. (*Wight*, 269.) There ſeems to be no ſatisfactory reaſon for this reſtriction, which would not equally extend to the excluſion of all the other ſons of a peer. Neither can ſuch eldeſt ſon be entitled to be enrolled and vote as a freeholder for any commiſſioner of a ſhire, though otherwiſe qualified, as was lately determined by the houſe of lords in the caſe of lord Daer, March 26, 1793. But the eldeſt ſons of Scotch peers may repreſent any place in England, as many do. (2 *Hatſ. Prec.* 12.) The two ſtatutes, 9 Ann. c. 5. and 33 Geo. II. c. 20. requiring knights of ſhires and members for boroughs to have reſpectively 600*l.* and 300 *l.* a year, are expreſsly confined to England. But a commiſſioner of a ſhire muſt be a freeholder, and it is a general rule that none can be elected, but thoſe who can elect. (*Wight*, 289.) And till the contrary was determined by a committee of the houſe of commons in the caſe of Wigtown in 1775, (2 *Doug.* 181.) it was ſuppoſed that it was neceſſary that every repreſentative of a borough ſhould be admitted a burgeſs of one of the boroughs which he repreſented. (*Wight*, 404.) It ſtill holds generally true in ſhires in Scotland, that the qualifications of the electors and elected are the ſame; or that elegibility and a right to elect are convertible terms. Upon ſome future occaſion I ſhall endeavour to prove, that, in the origin of repreſentation, they were univerſally the ſame in England.

(7) Since the union, the following orders have been made in the houſe of lords reſpecting the peerage of Scotland. Queen Anne, in the ſeventh year of her reign, had created James duke of Queenſbury duke of Dover, with remainder in tail to his ſecond

ſon,

THESE are the principal of the twenty-five articles of union, which are ratified and confirmed by ſtatute 5 Ann. c. 8. in which ſtatute there are alſo two acts of parliament

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ſon, then earl of Solway in Scotland; and upon the 21ſt of January 1708-9, it was reſolved by the lords, that a peer of Scotland claiming to ſit in the houſe of peers by virtue of a patent paſſed under the great ſeal of Great Britain, and who now ſits in the parliament of Great Britain, had no right to vote in the election of the ſixteen peers who are to repreſent the peers of Scotland in parliament.

The duke of Hamilton having been created duke of Brandon, it was reſolved by the lords on the 20th of December 1711, that no patent of honour granted to any peer of Great Britain, who was a peer of Scotland at the time of the union, ſhould entitle him to ſit in parliament. Notwithſtanding this reſolution gave great offence to the Scotch peerage, and to the queen and her miniſtry, yet a few years afterwards, when the duke of Dover died, leaving the earl of Solway, the next in remainder, an infant, who, upon his coming of age, petitioned the king for a writ of ſummons as duke of Dover; the queſtion was again argued on the 18th of December 1719, and the claim as before diſallowed. (See the argument, 1 *P. Wms.* 582.) But in 1782 the duke of Hamilton claimed to ſit as duke of Brandon, and the queſtion being referred to the judges, they were unanimouſly of opinion, that the peers of Scotland are not diſabled from receiving, ſubſequently to the union, a patent of peerage of Great Britain, with all the privileges uſually incident thereto. Upon which the lords certified to the king, that the writ of ſummons ought to be allowed to the duke of Brandon, who now enjoys a ſeat as a Britiſh peer. (6th June 1782.) But there never was any objection to an Engliſh peer's taking a Scotch peerage by deſcent; and therefore, before the laſt deciſion, when it was wiſhed to confer an Engliſh title upon a noble family of Scotland, the eldeſt ſon of the Scotch peer was created in his father's life-time an Engliſh peer, and this creation was not affected by the annexation by inheritance of the Scotch peerage. On the 13th February 1787, it was reſolved, that the earl of Abercorn and the duke of Queenſbury, who had been choſen of the number of the ſixteen peers of Scotland, having been created

recited; the one of Scotland, whereby the church of Scotland and alſo the four univerſities of that kingdom are eſtabliſhed for ever, and all ſucceeding ſovereigns are to take an oath inviolably to maintain the ſame; the other of England, 5 Ann. c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the ſame had been altered by parliament at that time) and all other acts then in force for the preſervation of the church of England, are declared perpetual; and it is ſtipulated that every ſubſequent king and queen ſhall take an oath inviolably to maintain the ſame within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that theſe two acts "ſhall for ever be "obſerved as fundamental and eſſential conditions of the "union."

UPON theſe articles and act of union, it is to be obſerved, 1. That the two kingdoms are now ſo inſeparably united, that nothing can ever diſunite them again; except the mutual conſent of both, or the ſucceſsful reſiſtance of either, upon apprehending an infringement of thoſe points which, when they were ſeparate and independent nations, it was mutually ſtipulated ſhould be "fundamental and eſſential conditions of the

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peers of Great Britain, thereby ceaſed to ſit in that houſe as repreſentatives of the peerage. See the argument in *Ann. Reg.* for 1787, p. 95. At the election occaſioned by the laſt reſolution, the dukes of Queenſbury and Gordon had given their votes as peers of Scotland contrary to the reſolution of 1709; in conſequence of which it was reſolved 18th May 1787, that a copy of that reſolution ſhould be tranſmitted to the lord regiſter of Scotland as a rule for his future proceeding in caſes of election.

The duke of Queenſbury and marquis of Abercorn had tendered their votes at the laſt general election, and their votes were rejected; but notwithſtanding the former reſolutions, on 23d May 1793, it was reſolved, that if duly tendered they ought to have been counted.

"union[e]." 2. That whatever elſe may be deemed "fundamental and eſſential conditions," the preſervation of the two churches of England and Scotland, in the ſame ſtate, that they were in at the time of the union, and the maintenance of the acts of uniformity which eſtabliſh our common prayer, are expreſsly declared ſo to be. 3. That therefore any alteration in the conſtitution of either of thoſe churches, or in the liturgy of the church of England, (unleſs with the conſent of the reſpective churches, collectively or repreſentatively given,) would be an infringement of theſe "fundamental and eſſential "conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be ſtill obſerved in that part of the iſland, unleſs altered by parliament; and, as the parliament has not yet thought proper, except in a few inſtances, to alter them, they ſtill (with regard to the

[e] It may juſtly be doubted, whether even ſuch an infringement (though a manifeſt breach of good faith, unleſs done upon the moſt preſſing neceſſity) would of itſelf diſſolve the union: for the bare idea of a ſtate, without a power ſomewhere veſted to alter every part of it's laws, is the height of political abſurdity. The truth ſeems to be, that in ſuch an *incorporate union* (which is well diſtinguiſhed by a very learned prelate from a *foederate alliance*, where ſuch an infringement would certainly reſcind the compact) the two contracting ſtates are totally annihilated, without any power of a revival; and a third ariſes from their conjunction, in which all the rights of ſovereignty, and particularly that of legiſlation, muſt of neceſſity reſide. (See Warburton's alliance, 195.) But the wanton or imprudent exertion of this right would probably raiſe a very alarming ferment in the minds of individuals; and therefore it is hinted above that ſuch an attempt might *endanger* (though by no means *deſtroy*) the union.

To illuſtrate this matter a little farther: an act of parliament to repeal or alter the act of uniformity in England, or to eſtabliſh epiſcopacy in Scotland, would doubtleſs in point of authority be ſufficiently valid and binding; and, notwithſtanding ſuch an act, the union would continue unbroken. Nay, each of theſe meaſures might be ſafely and honourably purſued, if reſpectively agreeable to the ſentiments of the Engliſh church, or the kirk in Scotland. But it ſhould ſeem neither prudent, nor perhaps conſiſtent with good faith, to venture upon either of thoſe ſteps, by a ſpontaneous exertion of the inherent powers of parliament, or at the inſtance of mere individuals—So ſacred indeed are the laws above-mentioned (for protecting each church and the Engliſh liturgy) eſteemed, that in the regency acts both of 1751 and 1765 the regents are expreſsly diſabled from aſſenting to the repeal or alteration of either theſe, or the act of ſettlement.

particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally ſpeaking, of no force or validity in Scotland (8); and of conſequence in the enſuing commentaries, we ſhall have very little occaſion to mention, any farther than ſometimes by way of illuſtration, the municipal laws of that part of the united kingdoms.

[99] THE town of Berwick upon Tweed was originally part of the kingdom of Scotland; and, as ſuch, was for a time reduced by king Edward I. into the poſſeſſion of the crown of England: and during ſuch it's ſubjection, it received from that prince a charter, which (after it's ſubſequent ceſſion by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III, with ſome additions; particularly that it ſhould be governed by the laws and uſages which it enjoyed during the time of king Alexander, that is, before it's reduction by Edward I. It's conſtitution was new-modelled, and put upon an Engliſh footing by a charter of king James I: and all it's liberties, franchiſes, and cuſtoms, were confirmed in parliament by the ſtatutes 22 Edw. IV. c. 8. and 2 Jac. I. c. 28. Though therefore it hath ſome local peculiarities, derived from the antient laws of Scotland [f], yet it is clearly part of the realm of England, being repreſented by burgeſſes in the houſe of commons, and bound by all acts of the Britiſh parliament, whether ſpecially named or otherwiſe. And therefore it was (perhaps ſuperfluouſly) declared by ſtatute 20 Geo. II. c. 42. that, where England only is mentioned in any act of parliament, the ſame notwithſtanding hath and ſhall be deemed to

[f] Hale Hiſt. C. L. 183. 1 Sid. 382. 462. 2 Show. 365.

(8) Acts of parliament in general paſſed ſince the union, extend to Scotland; but where a ſtatute is not applicable to Scotland, and where Scotland is not intended to be included, the method is to declare by *proviſo* that it does not extend to Scotland. 3 *Burr.* 853.

comprehend

comprehend the dominion of Wales and town of Berwick upon Tweed. And though certain of the king's writs or proceſſes of the courts of Weſtminſter do not uſually run into Berwick, any more than the principality of Wales, yet it hath been ſolemnly adjudged [g] that all prerogative writs (as thoſe of *mandamus*, prohibition, *habeas corpus*, *certiorari*, &c.) may iſſue to Berwick as well as to every other of the dominions of the crown of England, and that indictments and other local matters ariſing in the town of Berwick may be tried by a jury of the county of Northumberland (9).

As to Ireland, that is ſtill a diſtinct kingdom; though a dependent ſubordinate kingdom. It was only entitled the dominion or lordſhip of Ireland [h], and the king's ſtile was no other than *dominus Hiberniae*, lord of Ireland, till the thirty-third year of king Henry the eighth; when he aſſumed (10) the title of king, which is recognized by act of parliament 35 Hen. VIII. c. 3. But, as Scotland and England are now one and the ſame kingdom, and yet differ in their municipal laws; ſo England and Ireland are, on the other hand, diſtinct kingdoms, and yet in general agree in their laws. The inhabitants of Ireland are, for the moſt part, deſcended from the Engliſh, who planted it as a kind of colony, after the conqueſt of it by king Henry the ſecond: and the laws of England were then received and ſworn to by the Iriſh na- [100]

g Cro. Jac. 543. 2 Roll. abr. 292. Stat. 11 Geo. I. c. 4. 4 Burr. 834.

h *Stat. Hiberniae.* 14 Hen. III.

(9) See the caſe of the King *v.* Cowle, in 2 *Burr.* 834. in which Lord Mansfield ſeems to have collected and methodized all the learning reſpecting the conſtitution of the town of Berwick upon Tweed.

(10) The title of king was conferred upon him and his ſucceſſors by a ſtatute paſſed in Ireland expreſsly for that purpoſe, and it was made treaſon for any inhabitant of Ireland to deny it. 33 *Hen. VIII. c.* 1. *Iriſh Stat.*

tion,

tion, aſſembled at the council of Liſmore [i]. And as Ireland, thus conquered, planted, and governed, ſtill continues in a ſtate of dependence, it muſt neceſſarily conform to, and be obliged by, ſuch laws as the ſuperior ſtate thinks proper to preſcribe.

AT the time of this conqueſt the Iriſh were governed by what they called the Brehon law, ſo ſtiled from the Iriſh name of judges, who were denominated Brehons [k]. But king John in the twelfth year of his reign went into Ireland and carried over with him many able ſages of the law; and there by his letters patent, in right of the dominion of conqueſt, is ſaid to have ordained and eſtabliſhed that Ireland ſhould be governed by the laws of England [l]: which letters patent ſir Edward Coke [m] apprehends to have been there confirmed in parliament. But to this ordinance many of the Iriſh were averſe to conform, and ſtill ſtuck to their Brehon law: ſo that both Henry the third [n] and Edward the firſt [o] were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III. under Lionel duke of Clarence, and then lieutenant of Ireland, the Brehon law was formally aboliſhed, it being unanimouſly declared to be indeed no law, but a lewd cuſtom crept in of later
[101] times. And yet, even in the reign of queen Elizabeth, the wild natives ſtill kept and preſerved their Brehon law; which is deſcribed [p] to have been "a rule of right unwritten, but "delivered by tradition from one to another, in which often-"times there appeared great ſhew of equity in determining "the right between party and party, but in many things

[i] Pryn. on 4 Inſt. 249.

[k] 4 Inſt. 358. Edm. Spenſer's ſtate of Ireland. p. 1513. edit. Hughes.

[l] Vaugh. 394. 2 Pryn. Rec. 85. 3 Rep. 23.

[m] 1 Inſt. 141.

[n] *A. R.* 30. 1 Rym. *Feod.* 442.

[o] *A. R.* 5.—*pro eo quod leges quibus utuntur Hybernici Deo deteſtabiles exiſtunt, et omni juri diſſonant, adeo quod leges cenſeri non debeant;—nobis et conſilio noſtro ſatis videtur expediens, eiſdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.

[p] Edm. Spenſer, *ibid.*

"repugnant

" repugnant quite both to God's laws and man's." The latter part of this character is alone aſcribed to it, by the laws before-cited of Edward the firſt and his grandſon.

BUT as Ireland was a diſtinct dominion, and had parliaments of it's own, it is to be obſerved, that though the immemorial cuſtoms, or common law, of England were made the rule of juſtice in Ireland alſo, yet no acts of the Engliſh parliament, ſince the twelfth of king John, extended into that kingdom; unleſs it were ſpecially named, or included under general words, ſuch as, " within any of the king's do-" minions." And this is particularly expreſſed, and the reaſon given in the year books[q]: " a tax granted by the parlia-" ment of England ſhall not bind thoſe of Ireland, becauſe " they are not ſummoned to our parliament;" and again, " Ireland hath a parliament of it's own, and maketh and " altereth laws; and our ſtatutes do not bind them, becauſe " they do not ſend knights to our parliament: but their " perſons are the king's ſubjects, like as the inhabitants of " Calais, Gaſcoigne, and Guienne, while they continued " under the king's ſubjection." The general run of laws, enacted by the ſupetior ſtate, are ſuppoſed to be calculated for it's own internal government, and do not extend to it's diſtant dependent countries, which, bearing no part in the legiſlature, are not therefore in it's ordinary and daily contemplation. But, when the ſovereign legiſlative power ſees it neceſſary to extend it's care to any of it's ſubordinate dominions, and mentions them expreſsly by name or includes them under general words, there can be no doubt but then they are bound by it's laws[r].

THE original method of paſſing ſtatutes in Ireland was nearly the ſame as in England, the chief governor holding parliaments at his pleaſure, which enacted ſuch laws as they [102] thought proper[s]. But an ill uſe being made of this liberty,

q 20 Hen. VI. 7. 2 Ric III. 12. 22. Calvin's caſe.
r Yearbook 1 Hen. VII. 3. 7 Rep.
s Iriſh Stat. 11 Eliz. ſt. 3. c. 8.

particu-

particularly by lord Gormanſtown, deputy-lieutenant in the reign of Edward IV[t], a ſet of ſtatutes were there enacted in the 10 Hen. VII. (ſir Edward Poynings being then lord deputy, whence they are called Poynings' laws) one of which [u], in order to reſtrain the power as well of the deputy as the Iriſh parliament, provides, 1. That, before any parliament be ſummoned or holden, the chief governor and council of Ireland ſhall certify to the king under the great ſeal of Ireland the conſiderations and cauſes thereof, and the articles of the acts propoſed to be paſſed therein. 2. That after the king, in his council of England, ſhall have conſidered, approved, or altered the ſaid acts or any of them, and certified them back under the great ſeal of England, and ſhall have given licence to ſummon and hold a parliament, then the ſame ſhall be ſummoned and held; and therein the ſaid acts ſo certified, and no other, ſhall be propoſed, received, or rejected [w]. But as this precluded any law from being propoſed, but ſuch as were pre-conceived before the parliament was in being, which occaſioned many inconveniencies and made frequent diſſolutions neceſſary, it was provided by the ſtatute of Philip and Mary before-cited, that any new propoſitions might be certified to England in the uſual forms, even after the ſummons and during the ſeſſion of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of propoſing or altering, any law. But the uſage now is, that bills are often framed in either houſe, under the denomination of "heads for a bill or bills:" and in that ſhape they are offered to the conſideration of the lord lieutenant and privy council: who, upon ſuch parliamentary intimation, or otherwiſe upon the application of private perſons, receive and tranſmit ſuch heads, or reject them without any tranſmiſſion to England. And with regard to Poynings' law in particular, it cannot be repealed or ſuſpended, unleſs the bill for

[t] Iriſh Stat. 10 Hen. VII. c. 23. M. c. 4.
[u] Cap. 4. expounded by 3 & 4 Ph. & [w] 4 Inſt. 353.

that

that purpoſe, before it be certified to England, be approved by both the houſes [x] (12).

[x] Iriſh Stat. 11 Eliz. ſt. 3. c. 38.

(12) The hiſtory of the proceedings of the Iriſh parliament publiſhed by lord Mountmorres is a very valuable acceſſion to conſtitutional learning. It is a publication, which, beſides being immediately uſeful to Ireland, affords much important information to thoſe who are deſirous of having a well-grounded and an accurate knowlege of the Engliſh conſtitution; for the public proceedings of the neighbouring kingdoms of Scotland and Ireland furniſh ſtrong arguments from analogy, when difficult queſtions ariſe reſpecting the Engliſh conſtitution, and they are ſometimes irrefragable evidence of ancient principles which were once common to them all.

Lord Mountmorres obſerves upon the ſtatute referred to by the learned judge, that to repeal Poynings' law it required the conſent of *the greater number of the lords and commons*, which, if it meant any thing, muſt ſignify a majority not of thoſe who happened to be preſent, but of the whole number ſummoned to parliament; and that the requiſition in that ſenſe was ſtrictly complied with in 1782, when Poynings' law was repealed. 1 Vol. p. 53.

I ſhall here take the liberty to ſubjoin an extract from what lord Mountmorres calls "a ſhort view of the former, and of the "preſent method of paſſing laws and of holding parliaments in Ire-"land," as it contains a clearer and more authentic account than I could elſewhere collect:

"Before a parliament was held, it was expedient, antecedent to "one thouſand ſeven hundred and eighty-two, that the lord lieute-"nant and council ſhould ſend over an important bill as a reaſon "for ſummoning that aſſembly. This always created violent diſ-"putes, and it was conſtantly rejected; as a money bill, which ori-"ginated in the council, was contrary to a known maxim, that the "commons hold the purſe of the nation; and as all grants originate "from them, ſince, in early times, they were uſed to conſult with "their conſtituents upon the mode, duration, and quantum of the "ſupply.

"Propoſitions for laws, or heads of bills, as they are called, ori-"ginated indifferently in either houſe. After two readings and a "committal, they were ſent by the council to England, and were "ſubmitted, uſually by the Engliſh privy council, to the attorney "and

BUT the Iriſh nation, being excluded from the benefit of the Engliſh ſtatutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the meaſure of juſtice in both kingdoms becoming

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"and ſolicitor general; and from thence they were returned to the "council of Ireland, from whence they were ſent to the commons, "if they originated there, (if not, to the lords,) and after three "readings they were ſent up to the houſe of lords, where they went "through the ſame ſtages; and then the lord lieutenant gave the "royal aſſent in the ſame form which is obſerved in Great Britain.

"In all theſe ſtages in England and Ireland, it is to be remem-"bered, that any bill was liable to be rejected, amended, or al-"tered; but that when they had paſſed the great ſeal of Eng-"land, no alteration could be made by the Iriſh parliament.

"At preſent, by the chief baron Yelverton's law, it is not ne-"ceſſary for the council to certify a bill under the great ſeal of "Ireland, as a reaſon for ſummoning a parliament, but it is or-"dered to be convoked by proclamation from the crown, as it is "ſummoned in England.

"Touching bills, they now originate in either houſe, and go from "one to the other, as they do in England; after which they are de-"poſited in the lords' office, when the clerk of the crown takes a "copy of them, and this parchment is atteſted to be a true copy, by "the great ſeal of Ireland on the left ſide of the inſtrument. Thus "they are ſent to England by the Iriſh council, and if they are ap-"proved of by the king, this tranſmiſs, or copy, comes back with "the great ſeal of England on the right ſide, with a commiſſion to "the lord lieutenant to give the royal aſſent. All bills, except "money bills, remain in the lords' office; but bills of ſupply are "ſent back to the houſe of commons to be preſented by the "ſpeaker at the bar of the lords for the royal aſſent. Hence it is "manifeſt, that no alteration can now be made in bills, except in "parliament, as the record, or original roll, remains in the lords' "office till it obtains the royal aſſent.

"Of the rejection of bills, or not returning them from England, "it is ſaid there are very few inſtances of ſuch a refuſal by the "crown ſince one thouſand ſeven hundred and eighty-two; "though, doubtleſs, the royal negative in both kingdoms is as clear "a privilege as any other prerogative." 1 Vol. 57.

thence

thence no longer uniform, it was therefore enacted, by another of Poynings' laws[y], that all acts of parliament, before made in England, ſhould be of force within the realm of Ireland[z]. But, by the ſame rule, that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the Engliſh parliament made ſince the 10 Hen. VII. do now bind the people of Ireland, unleſs ſpecially named or included under general words[a]. And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by ſuch acts of parliament. For this follows from the very nature and conſtitution of a dependent ſtate: dependence being very little elſe, but an obligation to conform to the will or law of that ſuperior perſon or ſtate, upon which the inferior depends. The original and true ground of this ſuperiority, in the preſent caſe, is what we uſually call, though ſomewhat improperly, the right of conqueſt; a right allowed by the law of nations, if not by that of nature; but which in reaſon and civil policy can mean nothing more, than that, in order to put an end to hoſtilities, a compact is either expreſsly or tacitly made between the conqueror and the conquered, that if they will acknowlege the victor for their maſter, he will treat them for the future as ſubjects, and not as enemies[b].

But this ſtate of dependence being almoſt forgotten, and ready to be diſputed by the Iriſh nation, it became neceſſary ſome years ago to declare how that matter really ſtood: and therefore by ſtatute 6 Geo. I. c. 5. it is declared, that the kingdom of Ireland ought to be ſubordinate to, and dependent upon, the imperial crown of Great Britain, as being inſeparably united thereto: and that the king's majeſty, with the conſent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland (13). [104]

y cap. 22.
z 4 Inſt. 351.
a 12 Rep. 112.
b Puff. L. of N. viii. 6. 24.

(13) Prynne in his learned argument has enumerated ſeveral ſtatutes made in England from the time of king John, by which Ireland

THUS we ſee how extenſively the laws of Ireland communicate with thoſe of England: and indeed ſuch communication is highly neceſſary, as the ultimate reſort from the courts of juſtice in Ireland is, as in Wales, to thoſe in England; a writ of error (in the nature of an appeal) lying from the king's bench in Ireland to the king's bench in England [c], as the appeal from the chancery in Ireland lies immediately to the houſe of lords here: it being expreſsly declared, by the ſame ſtatute 6 Geo. I. c. 5. that the peers of Ireland have no juriſdiction to affirm or reverſe any judgments or decrees whatſoever (14). The propriety and even neceſſity, in

[c] This was law in the time of Hen. entituled, *diverſity of courts, c. bank le* VIII; as appears by the ancient book, *roy.*

Ireland was bound. (8 *St. Tr.* 343.) That was an argument to prove that lord Connor Maguire baron of Inneſkillin in Ireland, who had committed treaſon in that country, by being the principal contriver and inſtigator of the Iriſh rebellion and maſſacre in the time of Car I. and who had been brought to England againſt his will, could be lawfully tried for it in the king's bench at Weſtminſter by a Middleſex jury, and be ouſted of his trial by his peers in Ireland, by force of the ſtatute of 35 Hen. VIII. c. 2.

The priſoner having pleaded to the juriſdiction, the court, after hearing this argument, over-ruled the plea, and the deciſion was approved of by a reſolution of the two houſes of parliament, and lord Maguire was found guilty, and was afterwards executed at Tyburn as a traitor.

(14) By an act paſſed in the 22 Geo. III. c. 53. the ſtatute of Geo. I. is ſimply repealed. But as the ſtatute of Geo. I. was thought to be merely declaratory of the former law, the repeal of it could produce no further operation than to render the law in ſome degree leſs clear than that ſtatute had made it. Therefore to produce the intended effect, it required another ſtatute, which was paſſed in the 23 Geo. III. c. 28. which expreſsly declared that in all caſes whatever the people of Ireland ſhould be bound only by laws enacted by his majeſty and the parliament of that kingdom; and that no appeal or writ of error from any court in Ireland ſhould for the future be brought into any of the courts in England.

all inferior dominions, of this conſtitution, "that, though "juſtice be in general adminiſtered by courts of their own, "yet that the appeal in the laſt reſort ought to be to the "courts of the ſuperior ſtate," is founded upon theſe two reaſons. 1. Becauſe otherwiſe the law, appointed or permitted to ſuch inferior dominion, might be inſenſibly changed within itſelf, without the aſſent of the ſuperior. 2. Becauſe otherwiſe judgments might be given to the diſadvantage or diminution of the ſuperiority; or to make the dependence to be only of the perſon of the king, and not of the crown of England[d].

[105] WITH regard to the other adjacent iſlands which are ſubject to the crown of Great Britain, ſome of them (as the iſle of Wight, of Portland, of Thanet, *&c.*) are comprized within ſome neighbouring county, and are therefore to be looked upon as annexed to the mother iſland, and part of the kingdom of England. But there are others which require a more particular conſideration.

AND, firſt, the iſle of Man is a diſtinct territory from England, and is not governed by our laws: neither doth any act of parliament extend to it, unleſs it be particularly named therein; and then an act of parliament is binding there[e]. It was formerly a ſubordinate feudatory kingdom, ſubject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV. claiming the iſland by right of conqueſt, and diſpoſing of it to the earl of Northumberland; upon whoſe attainder it was granted (by the name of the lordſhip of Man) to ſir John de Stanley by letters patent 7 Henry IV[f]. In his lineal deſcendants it continued for eight generations, till the death of Ferdinando earl of Derby, *A. D.* 1594: when a controverſy aroſe concerning the inheritance thereof, between his daughters and William his ſurviving brother: upon which, and a

[d] Vaugh. 402.
[e] 4 Inſt. 284. 2 And. 116.
[f] Selden. tit hon. 1. 3.

doubt that was ſtarted concerning the validity of the original patent[g], the iſland was ſeiſed into the queen's hands, and afterwards various grants were made of it by king James the firſt; all which being expired or ſurrendered, it was granted afreſh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a reſtraint of the power of alienation by the ſaid earl and his iſſue male. On the death of James earl of Derby, *A. D.* 1735, the male line of earl William failing, the duke of Atholl ſucceeded to the iſland as heir general by a female branch. In the mean time, though the title of king had long been diſuſed, the earls of Derby, as lords of Man, had maintained a ſort of royal authority therein; by aſſenting or
[106] diſſenting to laws, and exerciſing an appellate juriſdiction. Yet, though no Engliſh writ, or proceſs from the courts of Weſtminſter, was of any authority in Man, an appeal lay from a decree of the lord of the iſland to the king of Great Britain in council[h]. But the diſtinct juriſdiction of this little ſubordinate royalty being found inconvenient for the purpoſes of public juſtice, and for the revenue, (it affording a commodious aſylum for debtors, outlaws, and ſmugglers,) authority was given to the treaſury by ſtatute 12 Geo. I. c. 28. to purchaſe the intereſt of the then proprietors for the uſe of the crown: which purchaſe was at length compleated in the year 1765, and confirmed by ſtatutes 5 Geo. III. c. 26 and 39. (15) whereby the whole iſland and all it's dependencies ſo granted as aforeſaid, (except the landed property of the Atholl family, their manerial rights and emoluments, and the patronage of the biſhoprick[i] and other eccleſiaſtical benefices,)

[g] Camden. Eliz. *A. D.* 1594.

[h] 1 P. Wms. 329.

[i] The biſhoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York, by ſtatute 33 Hen. VIII. c. 31.

(15) c. 26 is called the veſting act, and c. 39 the regulating act.

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are unalienably veſted in the crown, and ſubjected to the regulations of the Britiſh exciſe and cuſtoms.

THE iſlands of Jerſey, Guernſey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the firſt princes of the Norman line. They are governed by their own laws, which are for the moſt part the ducal cuſtoms of Normandy, being collected in an antient book of very great authority, entituled, *le grand couſtumier*. The king's writ, or proceſs from the courts of Weſtminſter, is there of no force; but his commiſſion is. They are not bound by common acts of our parliaments, unleſs particularly named[k]. All cauſes are originally determined by their own officers, the bailiffs and jurats of the iſlands; but an appeal lies from them to the king and council, in the laſt reſort.

BESIDES theſe adjacent iſlands, our more diſtant plantations in America, and elſewhere, are alſo in ſome reſpect ſubject to the Engliſh laws. Plantations or colonies, in diſtant countries, are either ſuch where the lands are claimed by [107] right of occupancy only by finding them deſart and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conqueſt, or ceded to us by treaties. And both theſe rights are founded upon the law of nature, or at leaſt upon that of nations. But there is a difference between theſe two ſpecies of colonies, with reſpect to the laws by which they are bound. For it hath been held[l], that if an uninhabited country be diſcovered and planted by Engliſh ſubjects, all the Engliſh laws then in being, which are the birthright of every ſubject[m], are immediately there in force. But this muſt be underſtood with very many and very great reſtrictions. Such coloniſts carry with them only ſo much of the Engliſh law, as is applicable to their own ſituation and the condition of an infant colony; ſuch, for inſtance, as the general rules of inheritance, and of protection from per-

[k] 4 Inſt. 286.
[l] Salk. 411. 666.
[m] 2 P. Wms. 75.

ſonal injuries. The artificial refinements and diſtinctions incident to the property of a great and commercial people, the laws of police and revenue, (ſuch eſpecially as are inforced by penalties,) the mode of maintenance for the eſtabliſhed clergy, the juriſdiction of ſpiritual courts, and a multitude of other proviſions, are neither neceſſary nor convenient for them, and therefore are not in force. What ſhall be admitted and what rejected, at what times, and under what reſtrictions, muſt, in caſe of diſpute, be decided in the firſt inſtance by their own provincial judicature, ſubject to the reviſion and control of the king in council: the whole of their conſtitution being alſo liable to be new-modelled and reformed by the general ſuperintending power of the legiſlature in the mother-country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change thoſe laws (16); but, till he does actually change them, the ancient laws of the country remain, unleſs ſuch as are againſt the law of God, as in the caſe of an infidel country[n]. Our American plantations are principally of this latter ſort, being obtained in the laſt century either by right of con-
[108] queſt and driving out the natives (with what natural juſtice I ſhall not at preſent enquire) or by treaties. And therefore the common law of England, as ſuch, has no allowance or authority there; they being no part of the mother-country, but diſtinct (though dependent) dominions. They are ſubject however to the control of the parliament; though (like Ireland, Man, and the reſt) not bound by any acts of parliament, unleſs particularly named.

WITH reſpect to their interior polity, our colonies are properly of three ſorts. 1. Provincial eſtabliſhments, the conſtitutions of which depend on the reſpective commiſſions

[n] 7 Rep. 17. Calvin's caſe. Show. Parl. C. 31.

(16) See an elaborate and learned argument by lord Mansfield to prove the king's legiſlative authority by his prerogative alone over a ceded conquered country. *Cowp.* 204.

iſſued

iſſued by the crown to the governors, and the inſtructions which uſually accompany thoſe commiſſions; under the authority of which, provincial aſſemblies are conſtituted, with the power of making local ordinances, not repugnant to the laws of England. 2. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and ſubordinate powers of legiſlation, which formerly belonged to the owners of counties palatine: yet ſtill with theſe expreſs conditions, that the ends for which the grant was made be ſubſtantially purſued, and that nothing be attempted which may derogate from the ſovereignty of the mother-country. 3. Charter governments, in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of England; and with ſuch rights and authorities as are ſpecially given them in their ſeveral charters of incorporation. The form of government in moſt of them is borrowed from that of England. They have a governor named by the king, (or in ſome proprietary colonies by the proprietor,) who is his repreſentative or deputy. They have courts of juſtice of their own, from whoſe deciſions an appeal lies to the king and council here in England. Their general aſſemblies which are their houſe of commons, together with their council of ſtate being their upper houſe, with the concurrence of the king or his repreſentative the governor, make laws ſuited to their own emergencies. But it is particularly declared by ſtatute 7 & 8 W. III. c. 22. that all laws, bye-laws, uſages, and cuſtoms, which ſhall be in [109] practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the ſaid plantations, ſhall be utterly void and of none effect. And, becauſe ſeveral of the colonies had claimed a ſole and excluſive right of impoſing taxes upon themſelves, the ſtatute 6 Geo. III. c. 12. expreſsly declares, that all his majeſty's colonies and plantations in America have been, are, and of right ought to be, ſubordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and ſtatutes of ſufficient

validity to bind the colonies and people of America, ſubjects of the crown of Great Britain, in all caſes whatſoever. And this authority has been ſince very forcibly exemplified, and carried into act by the ſtatute 7 Geo. III. c. 59. for ſuſpending the legiſlation of New-York; and by ſeveral ſubſequent ſtatutes (17).

THESE are the ſeveral parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely *as* the municipal laws of England. Moſt of them have probably copied the ſpirit of their own law from this original; but then it receives it's obligation, and authoritative force, from being the law of the country.

As to any foreign dominions which may belong to the perſon of the king by hereditary deſcent, by purchaſe, or other acquiſition, as the territory of Hanover, and his majeſty's other property in Germany; as theſe do not in any wiſe appertain to the crown of theſe kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any reſpect whatſoever. The Engliſh legiſlature had wiſely remarked the inconveniences that had formerly reſulted from dominions on the continent of Europe; from the Norman territory which William the con-
[110] queror brought with him, and held in conjunction with the Engliſh throne; and from Anjou, and it's appendages, which fell to Henry the ſecond by hereditary deſcent. They had

(17) By 22 Geo. III. c. 46. his majeſty was empowered to conclude a truce or peace with the colonies or plantations in America, and by his letters patent to ſuſpend or repeal any acts of parliament which related to thoſe colonies. And by the firſt article of the definitive treaty of peace and friendſhip between his Britannic majeſty and the United States of America, ſigned at Paris the 3d day of September 1783, his Britannic majeſty acknowledges the United States of America to be free, ſovereign and independent ſtates. (*Ann. Regiſt.* 1783, *State Papers.*)—And 23 Geo. III. c. 39. gives his majeſty certain powers for the better carrying on trade and commerce between England and the United States.

ſeen

ſeen the nation engaged for near four hundred years together in ruinous wars for defence of theſe foreign dominions; till, happily for this country, they were loſt under the reign of Henry the ſixth. They obſerved that, from that time, the maritime intereſts of England were better underſtood and more cloſely purſued: that, in conſequence of this attention, the nation, as ſoon as ſhe had reſted from her civil wars, began at this period to flouriſh all at once; and became much more conſiderable in Europe, than when her princes were poſſeſſed of a larger territory, and her councils diſtracted by foreign intereſts. This experience and theſe conſiderations gave birth to a conditional clauſe in the act[o] of ſettlement, which veſted the crown in his preſent majeſty's illuſtrious houſe, "that in caſe the crown and imperial dig-"nity of this realm ſhall hereafter come to any perſon not "being a native of this kingdom of England, this nation "ſhall not be obliged to engage in any war for the defence "of any dominions or territories which do not belong to the "crown of England, without conſent of parliament."

WE come now to conſider the kingdom of England in particular, the direct and immediate ſubject of thoſe laws, concerning which we are to treat in the enſuing commentaries. And this comprehends not only Wales and Berwick, of which enough has been already ſaid, but alſo part of the ſea. The main or high ſeas are part of the realm of England, for thereon our courts of admiralty have juriſdiction, as will be ſhewn hereafter; but they are not ſubject to the common law[p]. This main ſea begins at the low-water-mark. But between the high-water-mark, and the low-water-mark, where the ſea ebbs and flows, the common law and the admiralty have *diviſum imperium*, an alternate juriſdiction; one upon the water, when it is full ſea; the other upon the land, when it is an ebb[q].

THE territory of England is liable to two diviſions; the one eccleſiaſtical, the other civil.

[o] Stat. 12 & 13 Will. III. c. 3.
[p] Co. Litt. 260.
[q] Finch. L. 78.

1. THE eccleſiaſtical diviſion is, primarily, into two provinces, thoſe of Canterbury and York. A province is the circuit of an archbiſhop's juriſdiction. Each province contains divers dioceſes, or ſees of ſuffragan biſhops; whereof Canterbury includes twenty-one, and York three: beſides the biſhoprick of the iſle of Man, which was annexed to the province of York by king Henry VIII. Every dioceſe is divided into archdeaconries, whereof there are ſixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's juriſdiction, of whom hereafter; and every deanery is divided into pariſhes [r].

A PARISH is that circuit of ground which is committed to the charge of one parſon, or vicar, or other miniſter having cure of ſouls therein. Theſe diſtricts are computed to be near ten thouſand in number [s]. How antient the diviſion of pariſhes is, may at preſent be difficult to aſcertain; for it ſeems to be agreed on all hands, that in the early ages of chriſtianity in this iſland, pariſhes were unknown, or at leaſt ſignified the ſame that a dioceſe does now (18). There was then no appropriation of eccleſiaſtical dues to any particular church; but every man was at liberty to contribute his tithes to whatever prieſt or church he pleaſed, provided only that he did it to ſome; or, if he made no ſpecial appointment or appropriation thereof, they were paid into the hands of the biſhop, whoſe duty it was to diſtribute them among the clergy, and for other pious purpoſes, according to his own diſcretion [t].

MR. Camden [u] ſays, England was divided into pariſhes by archbiſhop Honorius about the year 630. Sir Henry Hobart [w]

[r] Co. Litt. 94.
[s] Gibſon's *Britain.*
[t] Seld. of tith. 9. 4. 2 Inſt. 646. Hob. 296.
[u] in his *Britannia.*
[w] Hob 296.

(18) When the *dioicbia*, or the diſtrict over which the biſhop exerciſed his ſpiritual functions, was divided into leſſer portions for the ſuperintendance of his clergy, a word of ſimilar import was adopted, *paroichia*. And in ancient times, Mr. Selden thinks, the words were uſed indiſcriminately. *Burn. Ec. L.* 59.

ſays

lays it down, that parishes were first erected by the council of Lateran, which was held *A. D.* 1179. Each widely differing from the other, and both of them perhaps from the truth, which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn [x], that the clergy lived in common without any division of parishes long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

WE find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary*; that is, every man paid his own (as was before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of king Edgar [y], that "*dentur omnes decimae primariae ecclesiae ad quam parochia pertinet.*" However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a coemetery or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: but, if it had no coemetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primariae ecclesiae* or mother-church [z].

THIS proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom

[x] of tithes, c. 9.
[y] c. 1.
[z] *Ibid.* c. 2. See also the laws of king Canute, c. 11. about the year 1030.

happens

happens that a manor extends itſelf over more pariſhes than one, though there are often many manors in one pariſh (19). The lords, as chriſtianity ſpread itſelf, began to build churches upon their own demeſnes or waſtes, to accommodate their tenants in one or two adjoining lordſhips; and, in order to have divine ſervice regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating miniſter, inſtead of leaving them at liberty to diſtribute them among the clergy of the dioceſe in general; and this tract of land, the tithes whereof were ſo appropriated, formed a diſtinct pariſh. Which will well enough account for the frequent intermixture of pariſhes one with another. For, if a lord had a parcel of land detached from the main of his eſtate, but not ſufficient to form a pariſh of itſelf, it was natural for him to endow his newly erected church with the tithes of thoſe disjointed lands; eſpecially if no church was then built in any lordſhip adjoining to thoſe outlying parcels.

THUS pariſhes were gradually formed, and pariſh churches endowed with the tithes that aroſe within the circuit aſſigned. But ſome lands, either becauſe they were in the hands of irreligious and careleſs owners, or were ſituate in foreſts and deſart places, or for other now unſearchable reaſons, were never united to any pariſh, and therefore continue to this day extraparochial; and their tithes are now by immemorial cuſtom payable to the king inſtead of the biſhop, in truſt and confidence that he will diſtribute them for the general good of the church [a]: yet extraparochial waſtes and marſh-lands, when improved and drained, are by the ſtatute 17 Geo. II. c. 37. to be aſſeſſed to all parochial rates in the pariſh next adjoining. And thus much for the eccleſiaſtical diviſion of this kingdom.

[a] 2 Inſt. 647. 2 Rep. 44. Cro. Eliz. 512.

(19) But at preſent the boundaries of the one afford no evidence or inference whatever of the boundaries of the other.

2. THE

2. THE civil diviſion of the territory of England is into counties, of thoſe counties into hundreds, of thoſe hundreds into tithings or towns. Which diviſion, as it now ſtands, ſeems to owe it's original to king Alfred: who, to prevent the rapines and diſorders which formerly prevailed in the realm, inſtituted tithings; ſo called, from the Saxon, becauſe *ten* freeholders with their families compoſed one. Theſe all dwelt together, and were ſureties or free pledges to the king for the good behaviour of each other; and if any offence was committed in their diſtrict, they were bound to have the offender forthcoming [b]. And therefore antiently no man was ſuffered to abide in England above forty days, unleſs he were enrolled in ſome tithing or decennary [c]. One of the principal inhabitants of the tithing is annually appointed to preſide over the reſt, being called the tithing-man, the headborough, (words which ſpeak their own etymology,) and in ſome countries the borſholder, or borough's-ealder, being ſuppoſed the diſcreeteſt man in the borough, town, or tithing [d].

TITHINGS, towns, or vills (20), are of the ſame ſignification in law; and are ſaid to have had, each of them, originally a church and celebration of divine ſervice, ſacraments, and burials [e]; though that ſeems to be rather an eccleſiaſtical,

[b] *Flet.* 1. 47. This the laws of king Edward the confeſſor, *c.* 20. very juſtly entitled "*ſumma et maxima ſecuritas, "per quam omnes ſtatu firmiſſimo ſuſti-"nentur;—quae hoc modo fiebat, quod "ſub decennali fidejuſſione debebant eſſe "univerſi, &c.*"

[c] Mirr. c. 1. § 3.

[d] Finch. L. 8.

[e] 1 Inſt. 115.

(20) In the 13 and 14 Car. II. c. 12., which provides that when a pariſh is ſo large that it cannot have the benefit of the overſeers and proviſion for the poor appointed by the 43 Eliz. c. 2., two overſeers may be appointed for every townſhip or village in ſuch pariſh. In this ſtatute the words *townſhip* and *village* have always been thought ſynonimous. But it has been held that wherever there is a conſtable, there is a townſhip. (1 *T. R.* 376.) Pariſhes in ſome counties, as in part of Bedfordſhire, are divided into tithings. (2 *Luders*, 511.)

than

than a civil diſtinction. The word *town* or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it the ſeveral ſpecies of cities, boroughs, and common towns. A city is a town incorporated, which is or hath been the ſee of a biſhop: and though the biſhoprick be diſſolved, as at Weſtminſter (21), yet

(21) Weſtminſter was one of the new biſhopricks created by Henry VIII. out of the revenues of the diſſolved monaſteries. (2 *Burn. E. L.* 78.) Thomas Thirlby was the only biſhop that ever filled that ſee: (*Godw. Com. de Præſ.* 570.) he ſurrendered the biſhoprick to Ed. VI. 30 March 1550, and on the ſame day it was diſſolved and added again to the biſhoprick of London. (*Rym. Foed.* 15 tom. p. 222.) Queen Mary afterwards filled the church with Benedictine monks, and Eliz. by authority of parliament, turned it into a collegiate church ſubject to a dean; but it retained the name of city, not perhaps becauſe it had been a biſhop's ſee, but becauſe, in the letters patent erecting it into a biſhoprick, king Henry declared, *volumus itaque et per præſentes ordinamus quod eccleſia cathedralis et ſedes epiſcopalis, ac quod tota villa noſtra Weſtmonaſterii ſit civitas, ipſamque civitatem Weſtmonaſterii vocari et nominari volumus et decernimus.* There was a ſimilar clauſe in favour of the other five new-created cities, viz. Cheſter, Peterborough, Oxford, Glouceſter, and Briſtol. The charter for Cheſter is in *Gibſ. Cod.* 1449; and that for Oxford in *Rym. Foed.* 14 tom. 754. Lord Coke ſeems anxious to rank Cambridge among the cities, becauſe he finds it called *civitas* in an antient record, which he "thought it good to mention in re-"membrace of his love and duty, *almæ matri academiæ Cantabrigiæ.*" (*Co. Litt.* 109.) The late learned Vinerian profeſſor of Oxford has produced a deciſive authority that cities and biſhops' ſees had not originally any neceſſary connection with each other.—It is that of Ingulphus, who relates that at the great council aſſembled in 1072, to ſettle the claim of precedence between the two archbiſhops, it was decreed that biſhops' ſees ſhould be tranſferred from towns to cities. (1 *Woodd.* 302.) In *Wil. Malm. Script. Ang.* p. 214. it is *conceſſum eſt epiſcopis de villis tranſire in civitates.*

The accidental coincidence of the ſame (or nearly the ſame) number of biſhops and cities would naturally produce the ſuppoſition that they were connected together as a neceſſary cauſe and effect. It is certainly (as Mr. Wooddeſon obſerves) a ſtrong confirmation of this authority, that the ſame diſtinction is not paid to biſhops' ſees

in

ſtill it remaineth a city [f]. A borough is now underſtood to be a town, either corporate or not, that ſendeth burgeſſes to parliament [g]. Other towns there are, to the number ſir Edward Coke ſays [h] of 8803, which are neither cities nor boroughs; ſome of which have the privileges of markets, and others not; but both are equally towns in law. To ſeveral of theſe towns there are ſmall appendages belonging, called hamlets; which are taken notice of in the ſtatute of Exeter [i], [115] which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills ſir Henry Spelman [k] conjectures to have conſiſted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of leſs than five. Theſe little collections of houſes are ſometimes under the ſame adminiſtration as the town itſelf, ſometimes governed by ſeparate officers; in which laſt caſe they are, to ſome purpoſes in law, looked upon as diſtinct townſhips. Theſe towns, as was before hinted, contained each originally but one pariſh, and one tithing; though many of them now, by the encreaſe of inhabitants, are divided into ſeveral pariſhes and tithings; and, ſometimes, where there is but one pariſh there are two or more vills or tithings.

As ten families of freeholders made up a town or tithing, ſo ten tithings compoſed a ſuperior diviſion, called a hundred, as conſiſting of ten times ten families. The hundred is governed by an high conſtable or bailiff, and formerly there was regularly held in it the hundred court for the trial of cauſes, though now fallen into diſuſe. In ſome of the

[f] Co. Litt. 109.
[g] Litt. § 164.
[h] 1 Inſt. 116.
[i] 14 Edw I.
[k] Gloſſ. 274.

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in Ireland.—Mr. Hargrave in his notes to Co. Litt. 110. proves, that, although Weſtminſter is a city, and has ſent citizens to parliament ſince the time of Ed. VI. it never was incorporated; and this is a ſtriking inſtance in contradiction to the learned opinions there referred to, viz. that the king could not grant within time of memory to any place the right of ſending members to parliament without firſt creating that place a corporation.

more

more northern counties theſe hundreds are called wapentakes [l] (22).

THE ſubdiviſion of hundreds into tithings ſeems to be moſt peculiarly the invention of Alfred: the inſtitution of hundreds themſelves he rather introduced than invented. For they ſeem to have obtained in Denmark [m]: and we find that in France a regulation of this ſort was made above two hundred years before; ſet on foot by Clotharius and Childebert, with a view of obliging each diſtrict to anſwer for the robberies committed in it's own diviſion. Theſe diviſions were, in that country, as well military as civil: and each contained a hundred freemen, who were ſubject to an officer called the *centenarius*; a number of which *centenarii* were themſelves
[116] ſubject to a ſuperior officer called the count or *comes* [n]. And indeed ſomething like this inſtitution of hundreds may be traced back as far as the antient Germans, from whom were derived both the Franks who became maſters of Gaul, and the Saxons who ſettled in England: for both the thing and the name, as a territorial aſſemblage of perſons, from which afterwards the territory itſelf might probably receive its denomination, were well known to that warlike people. "*Centeni ex ſingulis pagis ſunt, idque ipſum inter ſuos vocantur; et quod primo numerus fuit, jam nomen et honor eſt* [o]."

AN indefinite number of theſe hundreds make up a county or ſhire. Shire is a Saxon word ſignifying a diviſion; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman (as the Saxons called him) of the ſhire, to whom the government of it was

l Seld. *in Forteſc. c.* 24.
m Seld. tit. of honour. 2. 5. 3.
n Monteſq. Sp. L. 30. 17.
o Tacit. *de morib. German.* 6.

(22) *Et quod Angli vocant hundredum, comitatus Yorkſhire, Lincolnſhire, Nottinghamſhire, Leiceſterſhire, et Northamptonſhire, vocant wapentachium* (*Ll. Edw. c.* 33.). And it proceeds to explain why they are called ſo, *viz.* becauſe the people at a public meeting confirmed their union with the governor by touching his weapon or lance.

intruſted. This he uſually exerciſed by his deputy, ſtill called in Latin *vice-comes*, and in Engliſh, the ſheriff, ſhrieve, or ſhire-reeve, ſignifying the officer of the ſhire; upon whom by proceſs of time the civil adminiſtration of it is now totally devolved. In ſome counties there is an intermediate diviſion, between the ſhire and the hundreds, as lathes in Kent, and rapes in Suſſex, each of them containing about three or four hundreds apiece. Theſe had formerly their lathe-reeves and rape-reeves, acting in ſubordination to the ſhire-reeve. Where a county is divided into *three* of theſe intermediate juriſdictions, they are called trithings [p], which were antiently governed by a trithing-reeve. Theſe trithings ſtill ſubſiſt in the large county of York, where by an eaſy corruption they are denominated ridings; the north, the eaſt, and the weſt-riding. The number of counties in England and Wales have been different at different times: at preſent they are forty in England, and twelve in Wales.

THREE of theſe counties, Cheſter, Durham, and Lancaſter, are called counties palatine. The two former are ſuch by preſcription, or immemorial cuſtom; or, at leaſt as old as the Norman conqueſt [q]: the latter was created by king [117
Edward III, in favour of Henry Plantagenet, firſt earl and then duke of Lancaſter [r]; whoſe heireſs being married to John of Gant the king's ſon, the franchiſe was greatly enlarged and confirmed in parliament [s], to honour John of Gant himſelf, whom, on the death of his father-in-law, the king had alſo created duke of Lancaſter [t]. Counties palatine are ſo called *a palatio*; becauſe the owners thereof, the earl of Cheſter, the biſhop of Durham, and the duke of Lancaſter, had in thoſe counties *jura regalia*, as fully as the king hath in his palace; *regalem poteſtatem in omnibus*, as Bracton expreſſes it [u]. They might pardon treaſons, murders, and

[p] *LL. Edw. c.* 34.
[q] Seld. tit. hon. 2. 5. 8.
[r] *Pat.* 25 *Edw. III. p.* 1. *m.* 18. Seld. *ibid.* Sandford's gen. hiſt. 112. 4 Inſt. 204.
[s] *Cart.* 36 *Edw. III. n.* 9.
[t] *Pat.* 51 *Edw. III. m.* 33. Plowd. 215. 7 Rym. 138.
[u] *l.* 3. *c.* 8. § 4.

felonies;

felonies; they appointed all judges and juſtices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were ſaid to be done againſt their peace, and not, as in other places, *contra pacem domini regis* [w]. And indeed by the antient law, in all peculiar juriſdictions, offences were ſaid to be done againſt his peace in whoſe court they were tried: in a court-leet, *contra pacem domini*; in the court of a corporation, *contra pacem ballivorum*; in the ſheriff's court or tourn, *contra pacem vice-comitis* [x]. Theſe palatine privileges (ſo ſimilar to the regal independent juriſdictions uſurped by the great barons on the continent, during the weak and infant ſtate of the firſt feodal kingdoms in Europe [y]) were in all probability originally granted to the counties of Cheſter and Durham, becauſe they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having juſtice adminiſtered at home, might not be obliged to go out of the county, and leave it open to the enemy's incurſions; and that the owners, being encouraged by ſo large an authority, might be the more watchful in it's defence. And upon this account alſo there were formerly two
[118] other counties palatine, Pembrokeſhire and Hexhamſhire; the latter now united with Northumberland: but theſe were aboliſhed by parliament, the former in 27 Hen. VIII. the latter in 14 Eliz. And in 27 Hen. VIII, likewiſe, the powers before mentioned of owners of counties palatine were abridged; the reaſon for their continuance in a manner ceaſing; though ſtill all writs are witneſſed in their names, and all forfeitures for treaſon by the common law accrue to them [z].

OF theſe three, the county of Durham is now the only one remaining in the hands of a ſubject. For the earldom of Cheſter, as Camden teſtifies, was united to the crown by Henry III, and has ever ſince given title to the king's eldeſt ſon. And the county palatine, or duchy, of Lancaſter, was the property of Henry Bolingbroke, the ſon of John of

[w] 4 Inſt. 204.
[x] Seld. *in Heng. magn. c.* 2.
[y] Robertſon. Ch. V. i. 60.
[z] 4 Inſt. 205.

Gant, at the time when he wreſted the crown from king Richard II, and aſſumed the title of king Henry IV. But he was too prudent to ſuffer this to be united to the crown; leſt if he loſt one, he ſhould loſe the other alſo. For, as Plowden[a] and ſir Edward Coke[b] obſerve, "he knew he had the "duchy of Lancaſter by ſure and indefeaſible title, but that "his title to the crown was not ſo aſſured: for that after "the deceaſe of Richard II the right of the crown was in the "heir of Lionel duke of Clarence, *ſecond* ſon of Edward III; "John of Gant, father to this Henry IV, being but the "*fourth* ſon." And therefore he procured an act of parliament, in the firſt year of his reign, ordaining that the duchy of Lancaſter, and all other his hereditary eſtates, with all their royalties and franchiſes, ſhould remain to him and his heirs for ever; and ſhould remain, deſcend, be adminiſtered, and governed, in like manner as if he never had attained the regal dignity: and thus they deſcended to his ſon and grandſon, Henry V and Henry VI; many new territories and privileges being annexed to the duchy by the former[c]. Henry VI being attainted in 1 Edw. IV, this duchy was declared in parliament to have become forfeited to the crown[d], and at the ſame time an act was made to incorporate the duchy of Lan- [119] caſter, to continue the county palatine (which might otherwiſe have determined by the attainder[e]) and to make the ſame parcel of the duchy: and, farther, to veſt the whole in king Edward IV and his heirs, *kings of England*, for ever; but under a ſeparate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII another act was made, to reſume ſuch part of the duchy lands as had been diſmembered from it in the reign of Edward IV, and to veſt the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form, and condition, ſeparate from the crown of England and poſſeſſion of the ſame, as the three Henries and Edward IV, or any of them, had and held the ſame[f].

[a] 215.

[b] 4 Inſt. 205.

[c] *Parl.* 2 *Hen. V. n.* 30. 3 *Hen. V.* n. 15.

[d] 1 Ventr. 155.

[e] 1 Ventr. 157.

[f] Some have entertained an opinion (Plowd. 220, 1, 2. Lamb. *Archion.* 233. 4 Inſt. 206.) that by this act the right of the duchy veſted only in the *natural*,

THE iſle of Ely is not a county palatine, though ſometimes erroneouſly called ſo, but only a royal franchiſe: the biſhop having, by grant of king Henry the firſt, *jura regalia* within the iſle of Ely; whereby he exerciſes a juriſdiction over all cauſes, as well criminal as civil[s].

[120] THERE are alſo counties *corporate:* which are certain cities and towns, ſome with more, ſome with leſs territory annexed to them; to which out of ſpecial grace and favour the kings of England have granted the privilege to be counties of themſelves, and not to be comprized in any other county; but to be governed by their own ſheriffs and other magiſtrates, ſo that no officers of the county at large have any power to intermeddle therein. Such are London, York, Briſtol, Norwich, Coventry, and many others (23). And thus much of the countries ſubject to the laws of England.

tural, and not in the *political* perſon of king Henry VII, as formerly in that of Henry IV; and was deſcendible to his natural heirs, independent of the ſucceſſion to the crown. And, if this notion were well founded, it might have become a very curious queſtion at the time of the revolution in 1688, in whom the right of the duchy remained after king James's abdication, and previous to the attainder of the pretended prince of Wales. But it is obſervable, that in the ſame act the duchy of Cornwall is alſo veſted in king Henry VII and his heirs; which could never be intended in any event to be ſeparated from the inheritance of the crown. And indeed it ſeems to have been underſtood very early after the ſtatute of Henry VII, that the duchy of Lancaſter was by no means thereby made a ſeparate inheritance from the reſt of the royal patrimony; ſince it deſcended with the crown, to the half-blood in the inſtances of queen Mary and queen Elizabeth: which it could not have done, as the eſtate of a mere duke of Lancaſter, in the common courſe of legal deſcent. The better opinion therefore ſeems to be that of thoſe judges, who held (Plowd. 221.) that notwithſtanding the ſtatute of Hen. VII. (which was only an act of reſumption) the duchy ſtill remained as eſtabliſhed by the act of Edward IV; ſeparate from the other poſſeſſions of the crown in order and government, but united in point of inheritance.

[s] 4 Inſt. 220.

(23) 3 Geo. I. c. 5. for the regulation of the office of ſheriffs, enumerates twelve cities, and five towns, which are counties of themſelves, and which have conſequently their own ſheriffs. The cities are, London, Cheſter, Briſtol, Coventry, Canterbury, Exeter, Glouceſter, Litchfield, Lincoln, Norwich, Worceſter, York. The towns are Kingſton-upon-Hull, Nottingham, Newcaſtle-upon-Tyne, Pool, Southampton.

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER THE FIRST.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE objects of the laws of England are ſo very numerous and extenſive, that, in order to conſider them with any tolerable eaſe and perſpicuity, it will be neceſſary to diſtribute them methodically, under proper and diſtinct heads; avoiding as much as poſſible diviſions too large and comprehenſive on the one hand, and too trifling and minute on the other; both of which are equally productive of confuſion.

Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero[a], and after him our Bracton[b], have expreſſed it, *ſanctio juſta, jubens honeſta et prohibens contraria*; it follows, that the primary and principal objects of the law are RIGHTS and WRONGS. In the proſecution therefore of theſe commentaries, I ſhall follow this very ſimple and obvious diviſion; and ſhall in the firſt place conſider the *rights* that are commanded, and ſecondly the *wrongs* that are forbidden, by the laws of England.

RIGHTS are however liable to another ſubdiviſion: being either, firſt, thoſe which concern and are annexed to the perſons of men, and are then called *jura perſonarum* or the *rights of perſons*; or they are, ſecondly, ſuch as a man may acquire over external objects, or things unconnected with his perſon, which are ſtiled *jura rerum* or the *rights of things*. Wrongs alſo are diviſible into, firſt, *private wrongs*, which being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and ſecondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and miſdemeſnors.

THE objects of the laws of England falling into this fourfold diviſion, the preſent commentaries will therefore conſiſt of the four following parts: 1. *The rights of perſons*; with the means whereby ſuch rights may be either acquired or loſt. 2. *The rights of things*; with the means alſo of acquiring and loſing them. 3. *Private wrongs*, or civil injuries; with the means of redreſſing them by law. 4. *Public wrongs*, or crimes and miſdemeſnors; with the means of prevention and puniſhment (1).

[a] II *Philipp.* 12. [b] *l.* 1. *c.* 3.

(1) The diſtinction between *private wrongs* and *public wrongs* is more intelligible, and more accurately limited by the nature of the ſubjects, than the diſtinction between *the rights of things*, and *the rights of perſons*: for all rights whatever muſt be the rights of certain

WE are now, firſt, to conſider the *rights of perſons*; with the means of acquiring and loſing them.

Now the rights of perſons that are commanded to be obſerved by the municipal law are of two ſorts: firſt, ſuch as are due *from* every citizen, which are uſually called civil *duties*; and, ſecondly, ſuch as belong *to* him, which is the more popular acceptation of *rights* or *jura*. Both may indeed be comprized in this latter diviſion; for, as all ſocial duties are of a relative nature, at the ſame time that they are due *from* one man, or ſet of men, they muſt alſo be due *to* another. But I apprehend it will be more clear and eaſy, to conſider many of them as duties required from, rather than as rights belonging to, particular perſons. Thus, for inſtance, allegiance is uſually, and therefore moſt eaſily, conſidered as the duty of the people, and protection as the duty of the magiſtrate; and yet they are reciprocally, the rights as [123]

certain perſons to certain things. Every right is annexed to a certain character or relation, which each individual bears in ſociety. The rights of kings, lords, judges, huſbands, fathers, heirs, purchaſers, and occupants are all dependent upon the reſpective characters of the claimants. Theſe rights might again be divided into rights to poſſeſs certain things, and the rights to do certain actions. This latter claſs of rights conſtitute powers and authority. But the diſtinction of *rights of perſons* and *rights of things* in the firſt two volumes of the Commentaries, ſeems to have no other difference than the antitheſis of the expreſſion, and that too reſting upon a ſoleciſm; for the expreſſion, rights of things, or a right *of* a horſe, is contrary to the idiom of the Engliſh language: we ſay, invariably, a right *to* a thing. The diſtinction intended by the learned Judge, in the firſt two volumes, appears, in a great degree, to be that of the rights of perſons in public ſtations, and the rights of perſons in private relations. But as the order of legal ſubjects is, in a great meaſure, arbitrary, and does not admit of that mathematical arrangement, where one propoſition generates another, it perhaps would be difficult to diſcover any method more ſatisfactory, than that which the learned Judge has purſued, and which was firſt ſuggeſted by lord C. J. Hale. See *Hale's Analyſis of the Law.*

well as duties of each other. Allegiance is the right of the magiſtrate, and protection the right of the people.

PERSONS alſo are divided by the law into either natural perſons, or artificial. Natural perſons are ſuch as the God of nature formed us; artificial are ſuch as are created and deviſed by human laws for the purpoſes of ſociety and government, which are called corporations or bodies politic.

THE rights of perſons conſidered in their natural capacities are alſo of two ſorts, abſolute, and relative. Abſolute, which are ſuch as appertain and belong to particular men, merely as individuals or ſingle perſons: relative, which are incident to them as members of ſociety, and ſtanding in various relations to each other. The firſt, that is, abſolute rights, will be the ſubject of the preſent chapter.

BY the abſolute *rights* of individuals we mean thoſe which are ſo in their primary and ſtricteſt ſenſe; ſuch as would belong to their perſons merely in a ſtate of nature, and which every man is entitled to enjoy, whether out of ſociety or in it. But with regard to the abſolute *duties*, which man is bound
[124] to perform conſidered as a mere individual, it is not to be expected that any human municipal law ſhould at all explain or enforce them. For the end and intent of ſuch laws being only to regulate the behaviour of mankind, as they are members of ſociety, and ſtand in various relations to each other, they have conſequently no concern with any other but ſocial or relative duties. Let a man therefore be ever ſo abandoned in his principles, or vicious in his practice, provided he keeps his wickedneſs to himſelf, and does not offend againſt the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be ſuch as ſeem principally to affect himſelf, (as drunkenneſs, or the like,) they then become, by the bad example they ſet, of pernicious effects to ſociety; and therefore it is then the buſineſs of human laws to correct them. Here the circumſtance of publication is what alters the nature of the caſe.

Public ſobriety is a relative duty, and therefore enjoined by our laws; *private* ſobriety is an abſolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil ſanction (2). But with reſpect to *rights*, the caſe is different. Human laws define and enforce as well thoſe rights which belong to a man conſidered as an individual, as thoſe which belong to him conſidered as related to others.

FOR the principal aim of ſociety is to protect individuals in the enjoyment of thoſe abſolute rights, which were veſted in them by the immutable laws of nature; but which could not be preſerved in peace without that mutual aſſiſtance and intercourſe, which is gained by the inſtitution of friendly and ſocial communities. Hence it follows, that the firſt and primary end of human laws is to maintain and regulate theſe *abſolute* rights of individuals. Such rights as are ſocial and *relative* reſult from, and are poſterior to, the formation of ſtates and ſocieties: ſo that to maintain and regulate theſe, is clearly a ſubſequent conſideration. And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce ſuch rights as are abſolute, which in themſelves are few and ſimple; and then ſuch rights as [125] are relative, which, ariſing from a variety of connexions, will be far more numerous and more complicated. Theſe will take up a greater ſpace in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed

(2) This diſtinction ſeems to convey a doctrine that can hardly bear examination, or be reconciled with ſound law and morality. The circumſtance of publication as evidence of ſhameleſs profligacy and hardened depravity, may alter the nature of the puniſhment, but cannot alter the intrinſic criminality of the vicious act. Whatever is pernicious to ſociety as an example, muſt neceſſarily be vicious and deſtructive in itſelf. What is ruinous and criminal to repeat and follow, muſt alſo be ruinous and criminal to commence. Human laws prohibit every where the guilty action, but puniſhment can only be the conſequence of detection.

to examine how far all laws ought, and how far the laws of England actually do, take notice of theſe abſolute rights, and provide for their laſting ſecurity.

THE abſolute rights of man, conſidered as a free agent, endowed with diſcernment to know good from evil, and with power of chooſing thoſe meaſures which appear to him to be moſt deſirable, are uſually ſummed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty conſiſts properly in a power of acting as one thinks fit, without any reſtraint or control, unleſs by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into ſociety, gives up a part of his natural liberty, as the price of ſo valuable a purchaſe; and, in conſideration of receiving the advantages of mutual commerce, obliges himſelf to conform to thoſe laws, which the community has thought proper to eſtabliſh. And this ſpecies of legal obedience and conformity is infinitely more deſirable than that wild and ſavage liberty which is ſacrificed to obtain it. For no man, that conſiders a moment, would wiſh to retain the abſolute and uncontrolled power of doing whatever he pleaſes: the conſequence of which is, that every other man would alſo have the ſame power; and then there would be no ſecurity to individuals in any of the enjoyments of life. Political therefore, or civil liberty, which is that of a member of ſociety, is no other than natural liberty ſo far reſtrained by human laws (and no farther) as is neceſſary and expedient for the general advantage of the public [c]. Hence we may collect that the law, which reſtrains a man from doing miſ-
[126] chief to his fellow-citizens, though it diminiſhes the natural, increaſes the civil liberty of mankind; but that every wanton and cauſeleſs reſtraint of the will of the ſubject, whether practiſed by a monarch, a nobility, or a popular aſſembly, is a degree of tyranny: nay, that even laws themſelves, whe-

[c] *Facultas ejus, quod cuique facere libet, niſi quid jure prohibetur.* Inſt. 1. 3. 1.

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ther made with or without our conſent, if they regulate and conſtrain our conduct in matters of mere indifference, without any good end in view, are regulations deſtructive of liberty: whereas, if any public advantage can ariſe from obſerving ſuch precepts, the control of our private inclinations, in one or two particular points, will conduce to preſerve our general freedom in others of more importance; by ſupporting that ſtate of ſociety, which alone can ſecure our independence. Thus the ſtatute of king Edward IV [d], which forbad the fine gentlemen of thoſe times (under the degree of lord) to wear pikes upon their ſhoes or boots of more than two inches in length, was a law that ſavoured of oppreſſion; becauſe, however ridiculous the faſhion then in uſe might appear, the reſtraining it by pecuniary penalties could ſerve no purpoſe of common utility. But the ſtatute of king Charles II [e], which preſcribes a thing ſeemingly as indifferent, (a dreſs for the dead, who are all ordered to be buried in woollen,) is a law conſiſtent with public liberty; for it encourages the ſtaple trade, on which in great meaſure depends the univerſal good of the nation. So that laws, when prudently framed, are by no means ſubverſive but rather introductive of liberty; for (as Mr. Locke has well obſerved [f]) where there is no law there is no freedom. But then, on the other hand, that conſtitution or frame of government, that ſyſtem of laws, is alone calculated to maintain civil liberty, which leaves the ſubject entire maſter of his own conduct, except in thoſe points wherein the public good requires ſome direction or reſtraint (3).

[d] 3 Edw. IV. c. 5.
[e] 30 Car. II. ſt. 2. c. 3.
[f] on Gov. p. 2. § 57.

(3) This ſection is one of the very few intelligible deſcriptions of liberty, which have hitherto been communicated to the world. Though declamation and eloquence in all ages have exhauſted their ſtores upon this favourite theme, yet reaſon has made ſo little progreſs in aſcertaining the nature and boundaries of liberty, that there are very few authors indeed, either of this or of any other country, which can furniſh the ſtudious and ſerious reader with a clear

THE idea and practice of this political or civil liberty flourish in their higheſt vigour in theſe kingdoms, where it falls
[127] little ſhort of perfection, and can only be loſt or deſtroyed by

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a clear and conſiſtent account of this idol of mankind. Thouſands worſhip it, and are even ready to offer their blood as a ſacrifice to it, under the form of a tree, a cap, or a cockade. Theſe fooliſh ſymbols, with various watchwords of ſedition equally unmeaning, may enflame the paſſions of the vulgar for a time, when practiſed upon by all the artifices of deſigning and wicked men, and may ſuppreſs the voice of reaſon and ſobriety, but the conſequences are too terrible to laſt long. Anarchy muſt reform itſelf, or in a country where every crime is committed, and where neither life, perſon, nor property is ſecure, in ſuch a war of all againſt all, each for his own ſake will ſoon demand a truce, and offer articles of capitulation.

This ſubject deſerves a diſcuſſion much more extenſive than the limits of a note will admit, in which it would not be difficult to prove that Engliſhmen at preſent poſſeſs every ſpecies of liberty in a higher degree than ever was enjoyed in any other country, and even in a degree unknown to their anceſtors. But I ſhall here briefly ſubjoin the different notions conveyed by the word *liberty*, which even by the moſt eminent writers and orators are generally confounded together.

The *libertas quidlibet faciendi*, or the liberty of doing every thing which a man's paſſions urge him to attempt, or his ſtrength enables him to effect, is ſavage ferocity; it is the liberty of a tyger and not the liberty of a man.

"Moral or natural liberty (in the words of Burlamaqui, ch. 3. "ſ. 15.) is the right which nature gives to all mankind of diſ-"poſing of their perſons and property after the manner they judge "moſt conſonant to their happineſs, on condition of their acting "within the limits of the law of nature, and that they do not any "way abuſe it to the prejudice of any other men."

This is frequently confounded, and even by the learned Judge in this very ſection, with ſavage liberty.

Civil liberty is well defined by our author to be "that of a mem-"ber of ſociety, and is no other than *natural liberty* ſo far reſtrained "by human laws (and no farther) as is neceſſary and expedient "for the general advantage of the public."

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the folly or demerits of it's owner: the legiſlature, and of courſe the laws of England, being peculiarly adapted to the preſervation of this ineſtimable bleſſing even in the meaneſt.

Mr. Paley begins his excellent chapter upon civil liberty with the following definition: "Civil liberty is the not being reſtrained "by any law, but what conduces in a greater degree to the public "welfare." B. vi. c. 5.

The archbiſhop of York has defined "civil or legal liberty to "be that which conſiſts in a freedom from all reſtraints except "ſuch as eſtabliſhed law impoſes for the good of the community, "to which the partial good of each individual is obliged to give "place."—(A ſermon preached Feb. 21, 1777, p. 19.)

All theſe three definitions of civil liberty are clear, diſtinct, and rational, and it is probable they were intended to convey exactly the ſame ideas; but I am inclined to think that the definition given by the learned Judge is the moſt perfect, as there are many reſtraints by natural law, which, though the eſtabliſhed law does not enforce, yet it does not vacate and remove.

In the definition of civil liberty it ought to be underſtood, or rather expreſſed, that the reſtraints introduced by the law ſhould be equal to all, or as much ſo as the nature of things will admit.

Political liberty may be defined to be the ſecurity with which, from the conſtitution, form, and nature of the eſtabliſhed government, the ſubjects enjoy civil liberty. No ideas or definitions are more diſtinguiſhable than thoſe of civil and political liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name.—The learned Judge uſes political and civil liberty indiſcriminately; but it would perhaps be convenient uniformly to uſe thoſe terms in the reſpective ſenſes here ſuggeſted, or to have ſome fixed ſpecific denominations of ideas, which in their nature are ſo widely different.—The laſt ſpecies of liberty has probably more than the reſt engaged the attention of mankind, and particularly the people of England. Civil liberty, which is nothing more than the impartial adminiſtration of equal and expedient laws, they have long enjoyed nearly to as great an extent as can be expected under any human eſtabliſhment.

But ſome who are zealous to perpetuate theſe ineſtimable bleſſings of civil liberty, fancy that our political liberty may be augmented by reforms, or what they deem improvements in the conſtitution

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ſubject. Very different from the modern conſtitutions of other ſtates, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to veſt an

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of the government. Men of ſuch opinions and diſpoſitions there will be, and perhaps it is to be wiſhed that there ſhould be, in all times. But before any ſerious experiment is made, we ought to be convinced by little leſs than mathematical demonſtration, that we ſhall not ſacrifice ſubſtance to form, the end to the means, or exchange preſent poſſeſſion for future proſpects. It is true, that civil liberty may exiſt in perfection under an abſolute monarch, according to the well-known verſe:

Fallitur egregio quiſquis ſub principe credit
Servitium. Nunquam libertas gratior extat
Quam ſub rege pio. CLAUD.

But what ſecurity can the ſubjects have for the virtues of his ſucceſſor? Civil liberty can only be ſecure where the king has no power to do wrong, yet all the prerogatives to do good. Under ſuch a king, with two houſes of parliament, the people of England have a firm reliance that they will retain and tranſmit the bleſſings of civil and political liberty to the lateſt poſterity.

There is another common notion of liberty, which is nothing more than a freedom from confinement. This is a part of civil liberty, but it being the moſt important part, as a man in a gaol can have the exerciſe and enjoyment of few rights, it is καὶ ἐξοχὴν called *liberty*.

But where impriſonment is neceſſary for the ends of public juſtice, or the ſafety of the community, it is perfectly conſiſtent with civil liberty. For Mr. Paley has well obſerved that, "it is "not the rigour, but the inexpediency of laws and acts of autho-"rity, which makes them tyrannical." (B. vi. c. 5.)

This is agreeable to that notion of civil liberty entertained by Tacitus, one who was well acquainted with the principles of human nature and human governments, when he ſays, *Gothones regnantur paulò jam adductius, quam cetera Germanorum gentes, nondum tamen ſupra libertatem.* De Mor. Ger. c. 43.

It is very ſurpriſing that the learned Commentator ſhould cite with approbation (p. 6. and 125.) and that Monteſquieu ſhould adopt (b. xi. c. 13.) that abſurd definition of liberty given in Juſtinian's Inſtitutes: *Facultas ejus, quod cuique facere libet, niſi quid*

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arbitrary and deſpotic power, of controlling the actions of the ſubject, in the prince, or in a few grandees. And this ſpirit of liberty is ſo deeply implanted in our conſtitution, and rooted even in our very ſoil, that a ſlave or a negro, the moment he lands in England, falls under the protection of the

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vi, aut jure prohibetur. In every country, and under all circumſtances, the ſubjects poſſeſs the liberty deſcribed by this definition.

When an innocent negro is ſeized and chained, or is driven to his daily toil by a mercileſs maſter, he ſtill retains this ſpecies of liberty, or that little power of action, of which force and barbarous laws have not bereft him. But we muſt not have recourſe to a ſyſtem of laws, in which it is a fundamental principle, *quod principi placuit, legis habet vigorem*, for correct notions of liberty.

So far the Editor thought it proper to ſuggeſt to the ſtudent the different ſignifications of the word *liberty*; a word which it is of the utmoſt importance to mankind that they ſhould clearly comprehend: for though a genuine ſpirit of liberty is the nobleſt principle that can animate the heart of man, yet liberty, in all times, has been the clamour of men of profligate lives and deſperate fortunes: *Falsò libertatis vocabulum obtendi ab iis, qui privatim degeneres, in publicum exitioſi, nihil ſpei, niſi per diſcordias habeant*; (Tac. 11 Ann. c. 17.)—The firſt ſentence of Hooker's Eccleſiaſtical Polity contains no leſs truth and eloquence: "He "that goeth about to perſuade a multitude, that they are not ſo "well governed as they ought to be, ſhall never want attentive "and favourable hearers."

This ſubject might be elucidated by various inſtances, particularly from the laws and conſtitution of this country; and the Editor cannot but cheriſh even a confident hope, that they who acquire the moſt intimate acquaintance with thoſe laws and that conſtitution, will always be the moſt convinced, that to be free, is to live in a country where the laws are juſt, expedient, and impartially adminiſtered, and where the ſubjects have perfect ſecurity that they will ever continue ſo; and, allowing for ſome ſlight and perhaps inevitable imperfections, that to be free, is to be born and to live under the Engliſh conſtitution. *Hanc retinete, quæſo, Quirites, quam vobis tanquam hereditatem, majores veſtri reliquerunt.* Cic. 4 Phil.

laws, and ſo far becomes a freeman [s]; though the maſter's right to his ſervice may *poſſibly* ſtill continue (4).

THE abſolute rights of every Engliſhman, (which, taken in a political and extenſive ſenſe, are uſually called their liberties,) as they are founded on nature and reaſon, ſo they are coeval with our form of government; though ſubject at times to fluctuate and change: their eſtabliſhment (excellent as it is) being ſtill human. At ſome times we have ſeen them depreſſed by overbearing and tyrannical princes; at others ſo luxuriant as even to tend to anarchy, a worſe ſtate than tyranny itſelf, as any government is better than none at all (5). But the vigour of our free conſtitution has always delivered the nation from theſe embarraſſments: and, as ſoon as the convulſions conſequent on the ſtruggle have been over, the balance of our rights and liberties has ſettled to it's proper level; and their fundamental articles have been from time to time aſſerted in parliament, as often as they were thought to be in danger.

[s] Salk. 666. See ch. 14.

(4) It is not to the ſoil or to the air of England that negroes are indebted for their liberty, but to the efficacy of the writ of *habeas corpus*, which can only be executed by the ſheriff in an Engliſh county.—I do not ſee how the maſter's right to the ſervice can poſſibly continue; it can only ariſe from a contract, which the negro in a ſtate of ſlavery is incapable of entering into with his maſter. See page 425.

(5) Lord Camden concluded his judgment in the caſe of general warrants in the ſame words: "One word more for ourſelves; we "are no advocates for libels; all governments muſt ſet their faces "againſt them, and whenever they come before us and a jury, we "ſhall ſet our faces againſt them; and if juries do not prevent them, "they may prove fatal to liberty, deſtroy government, and introduce anarchy; but tyranny is better than anarchy, and the worſt "government better than none at all." 2 *Wilſ.* 292.

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FIRST, by the great charter of liberties, which was obtained, ſword in hand, from king John, and afterwards, with ſome alterations, confirmed in parliament by king Henry the third, his ſon. Which charter contained very few new grants; but, as ſir Edward Coke[h] obſerves, was for the moſt part declaratory of the principal grounds of the fundamental [128] laws of England (6). Afterwards by the ſtatute called *confirmatio cartarum*[i], whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be ſent to all cathedral churches, and read twice a year to the people; and ſentence of excommunication is directed to be as conſtantly denounced againſt all thoſe that by word, deed, or counſel, act contrary thereto, or in any degree infringe it. Next, by a multitude of ſubſequent corroborating ſtatutes, (ſir Edward Coke, I think, reckons thirty-two[k],) from the firſt Edward to Henry the fourth. Then, after a long interval, by *the petition of right*; which was a parliamentary declaration of the liberties of the people, aſſented to by king Charles the firſt in the beginning of his reign. Which was cloſely followed by the ſtill more ample conceſſions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many ſalutary laws, particularly the *habeas corpus* act, paſſed under Charles the ſecond. To theſe ſucceeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princeſs of Orange 13 February 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in theſe remarkable words; "and they do claim, demand, and inſiſt upon, all "and ſingular the premiſes, as their undoubted rights and "liberties." And the act of parliament itſelf[l] recognizes "all and ſingular the rights and liberties aſſerted and claim-

h 2 Inſt. proëm.
i 25 Edw. I.
k 2 Inſt. proëm.
l 1 W. & M. ſt. 2. c. 2.

(6) See a fuller account of Magna Charta, 4 vol. p. 424.

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"ed in the ſaid declaration to be the true, antient, and in-"dubitable rights of the people of this kingdom." Laſtly, theſe liberties were again aſſerted at the commencement of the preſent century, in the *act of ſettlement*[m], whereby the crown was limited to his preſent majeſty's illuſtrious houſe: and ſome new proviſions were added, at the ſame fortunate æra, for better ſecuring our religion, laws, and liberties; which the ſtatute declares to be "the birthright of the peo-"ple of England," according to the antient doctrine of the common law[n].

[129] THUS much for the *declaration* of our rights and liberties. The rights themſelves, thus defined by theſe ſeveral ſtatutes, conſiſt in a number of private immunities; which will appear, from what has been premiſed, to be indeed no other, than either that *reſiduum* of natural liberty, which is not required by the laws of ſociety to be ſacrificed to public convenience; or elſe thoſe civil privileges, which ſociety hath engaged to provide, in lieu of the natural liberties ſo given up by individuals. Theſe therefore were formerly, either by inheritance or purchaſe, the rights of all mankind; but, in moſt other countries of the world being now more or leſs debaſed and deſtroyed, they at preſent may be ſaid to remain, in a peculiar and emphatical manner, the rights of the people of England. And theſe may be reduced to three principal or primary articles; the right of perſonal ſecurity, the right of perſonal liberty, and the right of private property: becauſe, as there is no other known method of compulſion, or of abridging man's natural free will, but by an infringement or diminution of one or other of theſe important rights, the preſervation of theſe, inviolate, may juſtly be ſaid to include the preſervation of our civil immunities in their largeſt and moſt extenſive ſenſe.

I. THE right of perſonal ſecurity conſiſts in a perſon's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

[m] 12 & 13 W. III. c. 2. [n] Plowd. 55.

1. LIFE

1. LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as ſoon as an infant is able to ſtir in the mother's womb. For if a woman is quick with child, and, by a potion or otherwiſe, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and ſhe is delivered of a dead child; this, though not murder (7), was by the ancient law homicide or manſlaughter[o]. But the modern law doth not look upon this offence in quite ſo atrocious a light (8), but merely as [130] a heinous miſdemeſnor[p].

AN infant *in ventre ſa mere*, or in the mother's womb, is ſuppoſed in law to be born for many purpoſes. It is capable of having a legacy, or a ſurrender of a copyhold eſtate made to it. It may have a guardian aſſigned to it[q]; and it is enabled to have an eſtate limited to it's uſe, and to take afterwards by ſuch limitation, as if it were then actually born[r] (9). And in this point the civil law agrees with ours[s].

[o] *Si aliquis mulierem pregnantem percuſſerit, vel ei venenum dederit, per quod fecerit abortivum; ſi puerperium jam formatum fuerit, et maxime ſi fuerit animatum, facit homicidium.* Bracton. *l.* 3. c. 21.

[p] 3 Inſt. 50.

[q] Stat. 12 Car. II. c. 24.

[r] Stat. 10 & 11 W. III. c. 16.

[s] *Qui in utero ſunt, in jure civili intelliguntur in rerum natura eſſe, cum de eorum commodo agatur.* *Ff.* 1. 5. 26.

(7) The diſtinction between murder and manſlaughter or felonious homicide, in the time of Bracton, was in a great degree nominal. The puniſhment of both was the ſame; for murder as well as manſlaughter, by the common law, had the benefit of clergy. *Foſt.* 302.

(8) But if the child be born alive, and afterwards die in conſequence of the potion or beating, it will be murder (3 *Inſt.* 50. 1 *P. Wms.* 245.); and of courſe thoſe who, with a wicked intent, adminiſtered the potion, or adviſed the woman to take it, will be acceſſaries before the fact, and ſubject to the ſame puniſhment as the principal.

(9) It may have a diſtributive ſhare of inteſtate property even with the half blood (1 *Veſ.* 81.): it is capable of taking a deviſe of land (2 *Atk.* 117. 1 *Freem.* 244. 293.): it takes under a marriage ſettlement, a proviſion made for children living at the death of the father (1 *Veſ.* 85.). And it has lately been decided, that mar-

2. A MAN's limbs (by which for the preſent we only underſtand thoſe members which may be uſeful to him in fight, and the loſs of which alone amounts to mayhem by the common law) are alſo the gift of the wiſe creator, to enable him to protect himſelf from external injuries in a ſtate of nature. To theſe therefore he has a natural inherent right; and they cannot be wantonly deſtroyed or diſabled without a manifeſt breach of civil liberty.

BOTH the life and limbs of a man are of ſuch high value, in the eſtimation of the law of England, that it pardons even homicide if committed *ſe defendendo*, or in order to preſerve them. For whatever is done by a man, to ſave either life or member, is looked upon as done upon the higheſt neceſſity and compulſion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; theſe, though accompanied with all other the requiſite ſolemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehenſion of loſing his life, or even his limbs, in caſe of his non-compliance[t]. And the ſame is alſo a ſufficient excuſe for the commiſſion of many miſdemeſnors, as will appear in the fourth book. The conſtraint a man is under in theſe circumſtances is called in law *dureſs*, from the Latin *durities*, of which there are two
[131] ſorts; dureſs of impriſonment, where a man actually loſes his liberty, of which we ſhall preſently ſpeak; and dureſs *per minas*, where the hardſhip is only threatened and impending, which is that we are now diſcourſing of. Dureſs *per minas* is either for fear of loſs of life, or elſe for fear of mayhem, or loſs of limb. And this fear muſt be upon ſufficient reaſon;

[t] 2 Inſt. 483.

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riage, and the birth of a poſthumous child, amount to a revocation of a will executed previous to the marriage. (5 *T. R.* 49.) It takes land by deſcent, though, in that caſe, the preſumptive heir may enter and receive the profits for his own uſe till the birth of the child (3 *Wilſ.* 526.), which ſeems to be the only intereſt it loſes by it's ſituation. See alſo 2 vol. 169.

"non," as Bracton expreſſes it; "*ſuſpicio cujuſlibet vani et* "*meticuloſi hominis, ſed talis qui poſſit cadere in virum conſtan-*"*tem; talis enim debet eſſe metus, qui in ſe contineat vitae peri-*"*culum, aut corporis cruciatum*[u]." A fear of battery, or being beaten, though never ſo well grounded, is no dureſs; neither is the fear of having one's houſe burned, or one's goods taken away and deſtroyed; becauſe in theſe caſes, ſhould the threat be performed, a man may have ſatisfaction by recovering equivalent damages[w]: but no ſuitable atonement can be made for the loſs of life, or limb (10). And the indulgence ſhewn to a man under this, the principal, ſort of dureſs, the fear of loſing his life or limbs, agrees alſo with that maxim of the civil law; *ignoſcitur ei qui ſanguinem ſuum qualiter qualiter redemptum voluit*[x].

THE law not only regards life and member, and protects every man in the enjoyment of them, but alſo furniſhes him with every thing neceſſary for their ſupport. For there is no man ſo indigent or wretched, but he may demand a ſupply ſufficient for all the neceſſities of life from the more opulent part of the community, by means of the ſeveral ſtatutes enacted for the relief of the poor, of which in their proper places. A humane proviſion; yet, though dictated by the principles of ſociety, diſcountenanced by the Roman laws. For the edicts of the emperor Conſtantine commanding the public to maintain the children of thoſe who were unable to provide for them, in order to prevent the murder and expoſure of infants, an inſtitution founded on the ſame principle as our foundling hoſpitals, though comprized in the Theodoſian code[y], were rejected in Juſtinian's collection.

THESE rights, of life and member, can only be determined [132] by the death of the perſon; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was baniſhed or abjured the realm[z] by

[u] *l.* 2. *c.* 5.
[w] 2 Inſt. 483.
[x] *Ff.* 48. 21. 1.
[y] *l.* 11. *c.* 27.
[z] Co. Litt. 133.

(10) See 4 vol. 30.

the proceſs of the common law, or entered into religion; that is, went into a monaſtery, and became there a monk profeſſed: in which caſes he was abſolutely dead in law, and his next heir ſhould have his eſtate. For ſuch baniſhed man was entirely cut off from ſociety; and ſuch a monk, upon his profeſſion, renounced ſolemnly all ſecular concerns: and beſides, as the popiſh clergy claimed an exemption from the duties of civil life and the commands of the temporal magiſtrate, the genius of the Engliſh laws would not ſuffer thoſe perſons to enjoy the benefits of ſociety, who ſecluded themſelves from it, and refuſed to ſubmit to it's regulations[a]. A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his teſtament and executors; or, if he made none, the ordinary might grant adminiſtration to his next of kin, as if he were actually dead inteſtate. And ſuch executors and adminiſtrators had the ſame power, and might bring the ſame actions for debts due *to* the religious, and were liable to the ſame actions for thoſe due *from* him, as if he were naturally deceaſed[b]. Nay ſo far has this principle been carried, that when one was bound in a bond to an abbot and his ſucceſſors, and afterwards made his executors and profeſſed himſelf a monk of the ſame abbey, and in proceſs of time was himſelf made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt againſt his own executors to recover the money due[c]. In ſhort, a monk or religious was ſo effectually dead in law, that a leaſe made even to a third perſon, during the life (generally) of one who afterwards became a monk, determined by ſuch his entry into religion: for which reaſon leaſes, and other conveyances for life, were uſually made to have and to hold for the term of one's *natural* life[d]. But, even in the times of popery, the law of
[133] England took no cognizance of *profeſſion* in any foreign country, becauſe the fact could not be tried in our courts[e]; and therefore, ſince the reformation, this diſability is held to

[a] This was alſo a rule in the feodal law, *l.* 2. *t.* 21. *deſiit eſſe miles ſeculi, qui factus eſt miles Chriſti; nec beneficium pertinet ad eum qui non debet gerere officium.*

[b] Litt. § 200.

[c] Co. Litt. 133.

[d] 2 Rep. 48. Co. Litt. 132.

[e] Co. Litt. 132.

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be abolished[f]: as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28. (11).

THIS natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently inquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree: because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never inflict any punishment extending to life or limb, unless upon the highest necessity (12): and the constitution is an utter stranger

[f] 1 Salk. 162.

(11) One species of civil death may still exist in this country; that is, where a man by act of parliament is attainted of treason or felony, and saving his life, is banished for ever; this lord Coke declares to be a civil death. But he says, a temporary exile is not a civil death. *Co. Litt.* 133. And for the same reason where a man receives judgment of death, and afterwards leaves the kingdom for life, upon a conditional pardon, this seems to amount to a civil death: this practice did not exist in the time of lord Coke, who says, that a man can only lose his country by authority of parliament. *Ib.*

(12) This is a compliment which, I fear, the common law does not deserve; for although it did not punish with death any

to any arbitrary power of killing or maiming the ſubject without the expreſs warrant of law. "*Nullus liber homo,*" ſays the great charter[g], "*aliquo modo deſtruatur, niſi per legale judi-*
"*cium parium ſuorum aut per legem terrae.*" Which words, "*aliquo modo deſtruatur,*" according to ſir Edward Coke[h], include a prohibition not only of *killing*, and *maiming*, but alſo of *torturing* (to which our laws are ſtrangers) and of every oppreſſion by colour of an illegal authority. And it is enacted by the ſtatute 5 Edw. III. c. 9. that no man ſhall be fore-
[134] judged of life or limb, contrary to the great charter and the law of the land: and again, by ſtatute 28 Edw. III. c. 3. that no man ſhall be put to death, without being brought to anſwer by due proceſs of law.

3. BESIDES thoſe limbs and members that may be neceſſary to a man, in order to defend himſelf or annoy his enemy, the reſt of his perſon or body is alſo entitled, by the ſame natural right, to ſecurity from the corporal inſults of menaces, aſſaults, beating, and wounding; though ſuch inſults amount not to deſtruction of life or member.

4. THE preſervation of a man's health from ſuch practices as may prejudice or annoy it; and

5. THE ſecurity of his reputation or good name from the arts of detraction and ſlander, are rights to which every man is entitled, by reaſon and natural juſtice; ſince without theſe it is impoſſible to have the perfect enjoyment of any other advantage or right. But theſe three laſt articles (being of much leſs importance than thoſe which have gone before, and thoſe which are yet to come) it will ſuffice to have barely mentioned among the rights of perſons: referring the more minute diſ-

[g] c. 29. [h] 2 Inſt. 48.

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perſon who could read, even for any number of murders or other felonies, yet it inflicted death upon every felon who could not read, though his crime was the ſtealing only of twelve-pence farthing.

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cuſſion of their ſeveral branches, to thoſe parts of our commentaries which treat of the infringement of theſe rights, under the head of perſonal wrongs.

II. NEXT to perſonal ſecurity, the law of England regards, aſſerts, and preſerves the perſonal liberty of individuals. This perſonal liberty conſiſts in the power of loco-motion, of changing ſituation, or moving one's perſon to whatſoever place one's own inclination may direct; without impriſonment or reſtraint, unleſs by due courſe of law. Concerning which we may make the ſame obſervations as upon the preceding article; that it is a right ſtrictly natural; that the laws of England have never abridged it without ſufficient cauſe; and, that in this kingdom it cannot ever be abridged at the mere diſcretion of the magiſtrate, without the explicit permiſſion of the laws. Here again the language of the great charter[i] is, that no freeman ſhall be taken or impriſoned, [135] but by the lawful judgment of his equals, or by the law of the land. And many ſubſequent old ſtatutes[j] expreſsly direct, that no man ſhall be taken or impriſoned by ſuggeſtion or petition to the king or his council, unleſs it be by legal indictment, or the proceſs of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman ſhall be impriſoned or detained without cauſe ſhewn, to which he may make anſwer according to law. By 16 Car. I. c. 10. if any perſon be reſtrained of his liberty by order or decree of any illegal court, or by command of the king's majeſty in perſon, or by warrant of the council board, or of any of the privy council; he ſhall, upon demand of his council, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who ſhall determine whether the cauſe of his commitment be juſt, and thereupon do as to juſtice ſhall appertain. And by 31 Car II. c. 2. commonly called the *habeas corpus act*, the methods of obtaining this writ are ſo plainly pointed out and enforced, that, ſo long as this ſtatute remains unimpeached, no ſubject of

[i] c. 29.

[j] 5 Edw. III. c. 9. 25 Edw. III. ſt. 5. c. 4. 28 Edw. III. c. 3.

England can be long detained in priſon, except in thoſe caſes in which the law requires and juſtifies ſuch detainer. And, leſt this act ſhould be evaded by demanding unreaſonable bail, or ſureties for the priſoner's appearance, it is declared by 1 W. & M. ſt. 2. c. 2. that exceſſive bail ought not to be required.

OF great importance to the public is the preſervation of this perſonal liberty: for if once it were left in the power of any, the higheſt, magiſtrate to impriſon arbitrarily whomever he or his officers thought proper, (as in France it is daily practiſed by the crown[k],) there would ſoon be an end of all other rights and immunities. Some have thought, that unjuſt attacks, even upon life, or property, at the arbitrary will of the magiſtrate,
[136] are leſs dangerous to the commonwealth, than ſuch as are made upon the perſonal liberty of the ſubject. To bereave a man of life, or by violence to confiſcate his eſtate, without accuſation or trial, would be ſo groſs and notorious an act of deſpotiſm, as muſt at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the perſon, by ſecretly hurrying him to gaol, where his ſufferings are unknown or forgotten, is a leſs public, a leſs ſtriking, and therefore a more dangerous engine of arbitrary government. And yet ſometimes, when the ſtate is in real danger, even this may be a neceſſary meaſure. But the happineſs of our conſtitution is, that it is not left to the executive power to determine when the danger of the ſtate is ſo great, as to render this meaſure expedient: for it is the parliament only, or legiſlative power, that, whenever it ſees proper, can authorize the crown, by ſuſpending the *habeas corpus* act for a ſhort and limited time, to impriſon ſuſpected perſons without giving any reaſon for ſo doing; as the ſenate of Rome was wont to have recourſe to a dictator, a magiſtrate of abſolute authority, when they judged the republic in any imminent danger. The decree of the ſenate, which uſually preceded the nomination

[k] I have been aſſured upon good authority, that, during the mild adminiſtration of cardinal Fleury, above 54000 *lettres de cachet* were iſſued, upon the ſingle ground of the famous bulle *unigenitus*.

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of this magiſtrate, "*dent operam conſules, ne quid reſpublica detri-*"*menti capiat,*" was called the *ſenatus conſultum ultimae neceſſitatis.* In like manner this experiment ought only to be tried in caſes of extreme emergency; and in theſe the nation parts with it's liberty for a while, in order to preſerve it for ever.

THE confinement of the perſon, in any wiſe, is an impriſonment. So that the keeping a man againſt his will in a private houſe, putting him in the ſtocks, arreſting or forcibly detaining him in the ſtreet, is an impriſonment[l]. And the law ſo much diſcourages unlawful confinement, that if a man is under *dureſs of impriſonment*, which we before explained to mean a compulſion by an illegal reſtraint of liberty, until he ſeals a bond or the like; he may allege this dureſs, and avoid the extorted bond. But if a man be lawfully impriſoned, and either to procure his diſcharge, or on any other fair ac- [137] count, ſeals a bond or a deed, this is not by dureſs of impriſonment, and he is not at liberty to avoid it[m]. To make impriſonment lawful, it muſt either be by proceſs from the courts of judicature, or by warrant from ſome legal officer having authority to commit to priſon; which warrant muſt be in writing, under the hand and ſeal of the magiſtrate, and expreſs the cauſes of the commitment, in order to be examined into (if neceſſary) upon a *habeas corpus.* If there be no cauſe expreſſed, the gaoler is not bound to detain the priſoner[n]. For the law judges in this reſpect, ſaith ſir Edward Coke, like Feſtus the Roman governor; that it is unreaſonable to ſend a priſoner, and not to ſignify withal the crimes alleged againſt him.

A NATURAL and regular conſequence of this perſonal liberty is, that every Engliſhman may claim a right to abide in his own country ſo long as he pleaſes; and not to be driven from it unleſs by the ſentence of the law. The king indeed, by his royal prerogative, may iſſue out his writ *ne exeat*

[l] 2 Inſt. 589. [m] 2 Inſt. 482. [n] *Ibid.* 52, 53.

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regnum (13), and prohibit any of his ſubjects from going into foreign parts without licence [o]. This may be neceſſary for the public ſervice and ſafeguard of the commonwealth. But no power on earth, except the authority of parliament, can ſend any ſubject of England *out of* the land againſt his will; no, not even a criminal. For exile, and tranſportation, are puniſhments at preſent unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himſelf to eſcape a capital puniſhment, or elſe by the expreſs direction of ſome modern act of parliament (14). To this purpoſe the great charter [p] declares, that no freeman ſhall be baniſhed, unleſs by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2. (that ſecond *magna carta*, and ſtable bulwark of our liberties) it is enacted, that no ſubject of this realm, who is an inhabitant of England, Wales, or Berwick, ſhall be ſent priſoner into Scotland, Ireland, Jerſey, Guernſey, or places beyond the
[138] ſeas; (where they cannot have the full benefit and protec-

[o] F. N. B. 85. [p] c. 29.

(13) See p. 266.

(14) It is ſaid that exile was firſt introduced as a puniſhment by the legiſlature in the 39th year of Eliz. when a ſtatute enacted that "ſuch rogues as were dangerous to the inferior people ſhould be "baniſhed the realm;" (39 *Eliz. c.* 4. See *Barr. Ant. Stat.* 269.) and that the firſt ſtatute in which the word tranſportation is uſed is the 18 C. II. c. 3. which gives a power to the judges at their diſcretion either to execute or tranſport to America for life, the Moſs-troopers of Cumberland and Northumberland, (2 *Woodd.* 498.) a law which very unneceſſarily was continued till the 31 Geo. II. c. 42. and then made perpetual. This perhaps is the only inſtance in which the legiſlature has extended the term of tranſportation beyond fourteen years. But to perſons capitally convicted the king frequently offers a pardon upon condition of their being tranſported for life. Many have at firſt rejected this gracious offer, and there have been one or two inſtances of perſons ſo deſperate as to perſiſt in the refuſal, and who in conſequence ſuffered the execution of their ſentence. Where a pardon is granted upon condition of tranſportation, and no term is ſpecified, in that caſe the offender ſhall be tranſported for 14 years. 4 Geo. I. c. 11.

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tion of the common law;) but that all ſuch impriſonments ſhall be illegal; that the perſon, who ſhall dare to commit another contrary to this law, ſhall be diſabled from bearing any office, ſhall incur the penalty of a *praemunire*, and be incapable of receiving the king's pardon: and the party ſuffering ſhall alſo have his private action againſt the perſon committing, and all his aiders, adviſers, and abettors, and ſhall recover treble coſts; beſides his damages, which no jury ſhall aſſeſs at leſs than five hundred pounds.

THE law is in this reſpect ſo benignly and liberally conſtrued for the benefit of the ſubject, that, though *within* the realm the king may command the attendance and ſervice of all his liegemen, yet he cannot ſend any man *out of* the realm, even upon the public ſervice; excepting ſailors and ſoldiers, the nature of whoſe employment neceſſarily implies an exception: he cannot even conſtitute a man lord deputy or lieutenant of Ireland againſt his will, nor make him a foreign ambaſſador [q]. For this might in reality be no more than an honourable exile.

III. THE third abſolute right, inherent in every Engliſhman, is that of property: which conſiſts in the free uſe, enjoyment, and diſpoſal of all his acquiſitions, without any control or diminution, ſave only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the ſecond book of the enſuing commentaries: but certainly the modifications under which we at preſent find it, the method of conſerving it in the preſent owner, and of tranſlating it from man to man, are entirely derived from ſociety; and are ſome of thoſe civil advantages, in exchange for which every individual has reſigned a part of his natural liberty. The laws of England are therefore, in point of honour and juſtice, extremely watchful in aſcertaining and protecting this right. Upon this principle the great charter [r] has declared that no freeman ſhall be diſſeiſed, or diveſted, of his freehold, or of his liberties, or free cuſtoms, but by the judgment of his peers, or by the law of the

[q] 2 Inſt. 46. [r] c. 29.

land.

land. And by a variety of antient ſtatutes[a] it is enacted, that no man's lands or goods ſhall be ſeiſed into the king's hands, againſt the great charter, and the law of the land; and that no man ſhall be diſinherited, nor put out of his franchiſes or freehold, unleſs he be duly brought to anſwer, and be forejudged by courſe of law; and if any thing be done to the contrary, it ſhall be redreſſed, and holden for none.

So great moreover is the regard of the law for private property, that it will not authorize the leaſt violation of it; no, not even for the general good of the whole community. If a new road, for inſtance, were to be made through the grounds of a private perſon, it might perhaps be extenſively beneficial to the public; but the law permits no man, or ſet of men, to do this without conſent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Beſides, the public good is in nothing more eſſentially intereſted, than in the protection of every individual's private rights, as modelled by the municipal law. In this and ſimilar caſes the legiſlature alone can, and indeed frequently does, interpoſe, and compel the individual to acquieſce. But how does it interpoſe and compel? Not by abſolutely ſtripping the ſubject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby ſuſtained. The public is now conſidered as an individual, treating with an individual for an exchange. All that the legiſlature does, is to oblige the owner to alienate his poſſeſſions for a reaſonable price; and even this is an exertion of power, which the legiſlature indulges with caution, and which nothing but the legiſlature can perform (15).

[a] 5 Edw. III. c. 9. 25 Edw. III. ſt. 5. c. 4. 28 Edw. III. c. 3.

(15) But by the laſt highway act (13 Geo. III. c. 78.) two juſtices may either widen or divert any highway through or over

NOR is this the only inſtance in which the law of the land has poſtponed even public neceſſity to the ſacred and inviolable rights of private property. For no ſubject of England can be conſtrained to pay any aids or taxes, even for the defence of the realm or the ſupport of government, but ſuch as are impoſed by his own conſent, or that of his repreſentatives in parliament. By the ſtatute 25 Edw. I. c. 5. and 6. it is provided, that the king ſhall not take any aids or taſks, but by the common aſſent of the realm. And what that common aſſent is, is more fully explained by 34 Edw. I. ſt. 4. c. 1. which[t] enacts, that no talliage or aid ſhall be taken without the aſſent of the archbiſhops, biſhops, earls, barons, knights, burgeſſes, and other freemen of the land: and again, by 14 Edw. III. ſt. 2. c. 1. the prelates, earls, barons, and commons, citizens, burgeſſes, and merchants ſhall not be charged to make any aid, if it be not by the common aſſent of the great men and commons in parliament. And as this fundamental law had been ſhamefully evaded under many

[t] See the introduction to the great charter, (*edit. Oxon.*) *ſub anno* 1297; wherein it is ſhewn that this ſtatute *de talliagio non concedendo*, ſuppoſed to have been made in 34 Edw. I, is in reality nothing more than a ſort of tranſlation into Latin of the *confirmatio cartarum*, 25 Edw. I, which was originally publiſhed in the Norman language.

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any perſon's ſoil, even without his conſent, ſo that the new way ſhall not be more than thirty feet wide, and that they pull down no building, nor take away the ground of any garden, park, or yard. But the ſurveyor ſhall offer the owner of the ſoil, over which the new way is carried, a reaſonable compenſation, which if he refuſes to accept, the juſtices ſhall certify their proceedings to ſome general quarter ſeſſions, and the ſurveyor ſhall give fourteen days notice to the owner of the ſoil of an intention to apply to the ſeſſions; and the juſtices of the ſeſſions ſhall impanel a jury, who ſhall aſſeſs the damages, which the owner of the ſoil has ſuſtained, provided that they do not amount to more than forty years purchaſe. And the owner of the ſoil ſhall ſtill be entitled to all the mines within the ſoil, which can be got without breaking the ſurface of the highway.

ſucceeding

ſucceeding princes, by compulſive loans, and benevolences extorted without a real and voluntary conſent, it was made an article in the petition of right 3 Car. I, that no man ſhall be compelled to yield any gift, loan, or benevolence, tax, or ſuch like charge, without common conſent by act of parliament. And, laſtly, by the ſtatute 1 W. & M. ſt. 2. c. 2. it is declared, that levying money for or to the uſe of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the ſame is or ſhall be granted; is illegal.

IN the three preceding articles we have taken a ſhort view of the principal abſolute rights which appertain to every Engliſhman. But in vain would theſe rights be declared, aſcertained, and protected by the dead letter of the laws, if the
[141] conſtitution had provided no other method to ſecure their actual enjoyment. It has therefore eſtabliſhed certain other auxiliary ſubordinate rights of the ſubject, which ſerve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of perſonal ſecurity, perſonal liberty, and private property. Theſe are,

1. THE conſtitution, powers, and privileges of parliament, of which I ſhall treat at large in the enſuing chapter.

2. THE limitation of the king's prerogative, by bounds, ſo certain and notorious, that it is impoſſible he ſhould either miſtake or legally exceed them without the conſent of the people. Of this alſo I ſhall treat in it's proper place. The former of theſe keeps the legiſlative power in due health and vigour, ſo as to make it improbable that laws ſhould be enacted deſtructive of general liberty: the latter is a guard upon the executive power, by reſtraining it from acting either beyond or in contradiction to the laws, that are framed and eſtabliſhed by the other.

3. A THIRD ſubordinate right of every Engliſhman is that of applying to the courts of juſtice for redreſs of injuries.

Since the law is in England the ſupreme arbiter of every man's life, liberty, and property, courts of juſtice muſt at all times be open to the ſubject, and the law be duly adminiſtered therein. The emphatical words of *magna carta* [u], ſpoken in the perſon of the king, who in judgment of law (ſays ſir Edward Coke [w]) is ever preſent and repeating them in all his courts, are theſe; *nulli vendemus, nulli negabimus, aut differemus rectum vel juſtitiam:* "and therefore every ſubject," continues the ſame learned author, "for injury done to him *in* "*bonis, in terris, vel perſona*, by any other ſubject, be he "eccleſiaſtical or temporal, without any exception, may take "his remedy by the courſe of the law, and have juſtice and "right for the injury done to him, freely without ſale, fully "without any denial, and ſpeedily without delay." It were endleſs to enumerate all the *affirmative* acts of parliament, wherein juſtice is directed to be done according to the law of [142] the land: and what that law is, every ſubject knows, or may know, if he pleaſes; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unleſs by authority of parliament. I ſhall however juſt mention a few *negative* ſtatutes, whereby abuſes, perverſions, or delays of juſtice, eſpecially by the prerogative, are reſtrained. It is ordained by *magna carta* [x], that no freeman ſhall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8. and 11 Ric. II. c. 10. it is enacted, that no commands or letters ſhall be ſent under the great ſeal, or the little ſeal, the ſignet, or privy ſeal, in diſturbance of the law; or to diſturb or delay common right: and, though ſuch commandments ſhould come, the judges ſhall not ceaſe to do right; which is alſo made a part of their oath by ſtatute 18 Edw. III. ſt. 4. And by 1 W. & M. ſt. 2. c. 2. it is declared, that the pretended power of ſuſpending, or diſpenſing with laws, or the execution of laws, by regal authority, without conſent of parliament, is illegal.

[u] c. 29. [w] 2 Inſt. 55. [x] c. 29.

Nor

NOT only the ſubſtantial part, or judicial deciſions, of the law, but alſo the formal part, or method of proceeding, cannot be altered but by parliament: for, if once thoſe outworks were demoliſhed, there would be an inlet to all manner of innovation in the body of the law itſelf. The king, it is true, may erect new courts of juſtice; but then they muſt proceed according to the old eſtabliſhed forms of the common law. For which reaſon it is declared in the ſtatute 16 Car. I. c. 10. upon the diſſolution of the court of ſtarchamber, that neither his majeſty, nor his privy council, have any juriſdiction, power, or authority by Engliſh bill, petition, articles, libel, (which were the courſe of proceeding in the ſtarchamber, borrowed from the civil law,) or by any other arbitrary way whatſoever, to examine, or draw into queſtion, determine, or diſpoſe of the lands or goods of any ſubjects of this kingdom; but that the ſame ought to be tried and determined in the ordinary courts of juſtice, and by *courſe of law*.

[143] 4. IF there ſhould happen any uncommon injury, or infringment of the rights before-mentioned, which the ordinary courſe of law is too defective to reach, there ſtill remains a fourth ſubordinate right, appertaining to every individual, namely, the right of petitioning the king, or either houſe of parliament, for the redreſs of grievances. In Ruſſia we are told[y] that the czar Peter eſtabliſhed a law, that no ſubject might petition the throne, till he had firſt petitioned two different miniſters of ſtate. In caſe he obtained juſtice from neither, he might then preſent a third petition to the prince; but upon pain of death, if found to be in the wrong. The conſequence of which was, that no one dared to offer ſuch third petition; and grievances ſeldom falling under the notice of the ſovereign, he had little opportunity to redreſs them. The reſtrictions, for ſome there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the ſpirit of peace, they are no check upon that of liberty. Care only muſt be taken, leſt, under the pretence of petitioning, the ſubject be guilty of any

[y] Monteſq. Sp. L. xii. 26.

riot

riot or tumult; as happened in the opening of the memorable parliament in 1640; and, to prevent this, it is provided by the ſtatute 13 Car. II. ſt. 1. c. 5. that no petition to the king, or either houſe of parliament, for any alteration in church or ſtate, ſhall be ſigned by above twenty perſons, unleſs the matter thereof be approved by three juſtices of the peace, or the major part of the grand jury (16), in the country; and in London by the lord mayor, aldermen, and common council; nor ſhall any petition be preſented by more than ten perſons at a time. But, under theſe regulations, it is declared by the ſtatute 1 W. & M. ſt. 2. c. 2. that the ſubject hath a right to petition; and that all commitments and proſecutions for ſuch petitioning are illegal.

5. THE fifth and laſt auxiliary right of the ſubject, that I ſhall at preſent mention, is that of having arms for their defence, ſuitable to their condition and degree, and ſuch as are allowed by law. Which is alſo declared by the ſame ſtatute [144]
1 W. & M. ſt. 2. c. 2. and it is indeed a public allowance under due reſtrictions, of the natural right of reſiſtance and ſelf-preſervation, when the ſanctions of ſociety and laws are found inſufficient to reſtrain the violence of oppreſſion.

IN theſe ſeveral articles conſiſt the rights, or, as they are frequently termed, the liberties of Engliſhmen: liberties, more generally talked of than thoroughly underſtood; and yet highly neceſſary to be perfectly known and conſidered by every man of rank or property, leſt his ignorance of the points whereon they are founded ſhould hurry him into faction and licentiouſneſs on the one hand, or a puſillanimous indifference and criminal ſubmiſſion on the other. And we

(16) Either at the aſſizes or quarter ſeſſions. The puniſhment for offending againſt this act not to exceed a fine of 100*l.* and impriſonment for three months. Upon the trial of lord George Gordon, lord Mansfield and the court declared, that they were clearly of opinion that this ſtatute was not in any degree affected by the bill of rights. 1 *W. & M. ſt.* 2. *c.* 2. *Doug.* 571.

have ſeen that theſe rights conſiſt, primarily, in the free enjoyment of perſonal ſecurity, of perſonal liberty, and of private property. So long as theſe remain inviolate, the ſubject is perfectly free; for every ſpecies of compulſive tyranny and oppreſſion muſt act in oppoſition to one or other of theſe rights, having no other object upon which it can poſſibly be employed. To preſerve theſe from violation, it is neceſſary that the conſtitution of parliament be ſupported in it's full vigour; and limits, certainly known, be ſet to the royal prerogative. And, laſtly, to vindicate theſe rights, when actually violated or attacked, the ſubjects of England are entitled, in the firſt place, to the regular adminiſtration and free courſe of juſtice in the courts of law; next, to the right of petitioning the king and parliament for redreſs of grievances; and, laſtly, to the right of having and uſing arms for ſelf-preſervation and defence. And all theſe rights and liberties it is our birthright to enjoy entire; unleſs where the laws of our country have laid them under neceſſary reſtraints. Reſtraints in themſelves ſo gentle and moderate, as will appear upon farther enquiry, that no man of ſenſe or probity would wiſh to ſee them ſlackened. For all of us have it in our choice to do every thing that a good man would deſire to do; and are reſtrained from nothing, but what would be pernicious either to ourſelves or our fellow-citizens. So that this review
[145] of our ſituation may fully juſtify the obſervation of a learned French author, who indeed generally both thought and wrote in the ſpirit of genuine freedom [z]; and who hath not ſcrupled to profeſs, even in the very boſom of his native country, that the Engliſh is the only nation in the world, where political or civil liberty is the direct end of it's conſtitution. Recommending therefore to the ſtudent in our laws a farther and more accurate ſearch into this extenſive and important title, I ſhall cloſe my remarks upon it with the expiring wiſh of the famous father Paul to his country, "ESTO PERPETUA!"

[z] Monteſq. Sp. L. xi. 5.

JOHN LORD SOMERS.
PRODESSE QUAM CONSPICI

CHAPTER THE SECOND.

OF THE PARLIAMENT.

WE are next to treat of the rights and duties of perſons, as they are members of ſociety, and ſtand in various relations to each other. Theſe relations are either public or private: and we will firſt conſider thoſe that are public.

THE moſt univerſal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magiſtrates and people. Of magiſtrates ſome alſo are *ſupreme*, in whom the ſovereign power of the ſtate reſides; others are *ſubordinate*, deriving all their authority from the ſupreme magiſtrate, accountable to him for their conduct, and acting in an inferior ſecondary ſphere.

IN all tyrannical governments the ſupreme magiſtracy, or the right of both *making* and of *enforcing* the laws, is veſted in one and the ſame man, or one and the ſame body of men; and wherever theſe two powers are united together, there can be no public liberty. The magiſtrate may enact tyrannical laws, and execute them in a tyrannical manner, ſince he is poſſeſſed, in quality of diſpenſer of juſtice, with all the power which he as legiſlator thinks proper to give himſelf. But, where the legiſlative and executive authority are in diſtinct hands, the former will take care not to entruſt the latter with ſo large a power, as may tend to the ſubverſion of it's own independence, and therewith of the liberty of the ſubject. With us therefore in England this ſupreme power is divided into

two branches; the one legiſlative, to wit, the parliament, conſiſting of king, lords, and commons; the other executive, conſiſting of the king alone. It will be the buſineſs of this chapter to conſider the Britiſh parliament; in which the legiſlative power, and (of courſe) the ſupreme and abſolute authority of the ſtate, is veſted by our conſtitution.

THE original or firſt inſtitution of parliament is one of thoſe matters which lie ſo far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word, *parliament*, itſelf, (*parlement* or *colloquium*, as ſome of our hiſtorians tranſlate it,) is comparatively of modern date; derived from the French, and ſignifying an aſſembly that met and conferred together. It was firſt applied to general aſſemblies of the ſtates under Louis VII. in France, about the middle of the twelfth century[z] (1). But

[z] Mod. Un. Hiſt. xxiii. 307. The firſt mention of it in our ſtatute law is in the preamble to the ſtatute of Weſtm. 1. 3 Edw. I. *A. D.* 1272.

(1) The word *parliamentum* was not uſed in England till the reign of Hen. III. (*Pryn. on 4 Inſt.* 2.) Sir Henry Spelman in his Gloſſary, (*voc. Parl.*) ſays, *Johannes rex haud dicam parliamentum, nam hoc nomen non tum emicuit, ſed communis concilii regni formam et coactionem perſpicuam dedit.*

It was from the uſe of the word *parliamentum* that Prynne diſcovered lord Coke's manuſcript, *Modus tenendi parliamentum tempore regis Edwardi, filii regis Etheldredi, &c.* to be ſpurious. Lord Coke ſet a high value upon it, and has aſſured us, "that certain it is, "this *modus* was rehearſed and declared before the conqueror at the "conqueſt, and by him approved." (4 *Inſt.* 12.) But for many reigns after this word was introduced, it was indiſcriminately applied to a ſeſſion and to the duration of the writ of ſummons; we now confine it to the latter, viz. to the period between the meeting after the return of the writ of ſummons and the diſſolution. Etymology is not always frivolous pedantry; it ſometimes may afford an uſeful comment upon the original ſignification of a word. No inconſiderable pains have been beſtowed by learned men in analyſing the word *parliament*; though the following ſpecimens will ſerve rather to amuſe than to inſtruct: "The word parliament," ſaith one,

it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and ſettled in the great councils of the realm. A practice, which ſeems to have been univerſal among the northern nations, particularly the Germans [b]; and carried

[b] *De minoribus rebus principes conſultant, de majoribus omnes.* Tac. *de mor. Germ. c.* 11.

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one, "is compounded of *parium lamentum*; becauſe (as he thinks) "the peers of the realm did at theſe aſſemblies lament and com- "plain each to the other of the enormities of the country, and "thereupon provided redreſs for the ſame." (*Lamb. Arch.* 235.) Whitelocke in his notes (174.), declares, "that this derivation of "parliament is a ſad etymology." Lord Coke and many others ſay, that "it is called parliament becauſe every member of that "court ſhould ſincerely and diſcreetly *parler la ment*, ſpeak his mind "for the general good of the commonwealth." (*Co. Litt.* 110.) Mr. Lambard inform us, that "Lawrence Vallo miſliketh this "derivation." (*Arch.* 236.) And Lawrence Vallo is not ſingular; for Mr. Barrington aſſures us, that "lord Coke's etymology of the "word parliament from ſpeaking one's mind has been long ex- "ploded. If one might preſume (adds he) to ſubſtitute another "in it's room after ſo many gueſſes by others, I ſhould ſuppoſe "it was a compound of the two Celtic words *parly* and *ment*, or "*mend*. Both theſe words are to be found in Bullet's Celtic Dic- "tionary publiſhed at Beſançon in 1754. 3d vol. fol. He renders "*parly* by the French infinitive *parler*; and we uſe the word in "England as a ſubſtantive, viz. *parley*; *ment* or *mend* is rendered "*quantité, abondance.* The word parliament therefore being re- "ſolved into it's conſtituent ſyllables, may not improperly be ſaid "to ſignify what the Indians of North America call a Great "Talk." (Ant. Stat. 48.)—I ſhall leave it to the reader to deter- mine which of theſe derivations is moſt deſcriptive of a parlia- ment; and perhaps after ſo much recondite learning it may ap- pear preſumptuous in me to obſerve, that parliament imported originally nothing more than a council or conference; and that *ment* in parliament has no more ſignification than it has in impeach- ment, engagement, impriſonment, hereditament, and a thouſand others of the ſame nature, though the civilians have adopted a ſimilar derivation, viz. teſtament from *teſtari mentem.* Tay. Civ. Law. 70.

by them into all the countries of Europe, which they overran at the diſſolution of the Roman empire. Relics of which conſtitution, under various modifications and changes, are ſtill to be met with in the diets of Poland, Germany, and Sweden, and the aſſembly of the eſtates in France[c]: for what is there now called the parliament is only the ſupreme court of juſtice, conſiſting of the peers, certain dignified eccleſiaſtics and judges; which neither is in practice, nor is ſuppoſed to be in theory, a general council of the realm.

WITH us in England this general council hath been held immemorially, under the ſeveral names of *mychel-ſynoth* or great council, *michel-gemote* or great meeting, and more fre-
[148] quently *wittena-gemote*, or the meeting of wiſe men. It was alſo ſtiled in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *aſſiſa generalis*, and ſometimes *communitas regni Angliae*[d]. We have inſtances of it's meeting to order the affairs of the kingdom, to make new laws, and to mend the old, or, as Fleta[e] expreſſes it, "*novis injuriis emerſis nova conſtituere remedia*," ſo early as the reign of Ina king of the Weſt Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the ſeveral realms of the heptarchy. And, after their union, the mirror informs[f] us, that king Alfred ordained for a perpetual uſage, that theſe councils ſhould meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they ſhould keep themſelves from ſin, ſhould live in quiet, and ſhould receive right. Our ſucceeding Saxon and Daniſh monarchs held frequent councils of this ſort, as appears from their reſpective codes of laws; the titles whereof uſually ſpeak them to be enacted, either by the king with the advice of his wittena-gemote, or wiſe men, as, "*haec ſunt inſtituta, quae Edgarus rex conſilio ſapientum ſuorum inſtituit;*" or to be enacted by thoſe ſages with the advice

[c] Theſe were aſſembled for the laſt time, *A. D.* 1561. (See Whitelocke of parl. c. 72.) or according to Robertſon, *A. D.* 1614. (Hiſt. Ch. V. i. 369.)

[d] Glanvil. *l.* 13. *c.* 32. *l.* 9. *c.* 10. —Pref. 9 Rep.—2 Inſt. 526.

[e] *l.* 2. *c.* 2.

[f] *c.* 4. § 3.

of

of the king, as, "*haec ſunt judicia, quae ſapientes conſilio regis* "*Ethelſtani inſtituerunt;*" or laſtly, to be enacted by them both together, as, "*haec ſunt inſtitutiones, quas rex Edmundus* "*et epiſcopi ſui cum ſapientibus ſuis inſtituerunt.*"

THERE is alſo no doubt but theſe great councils were occaſionally held under the firſt princes of the Norman line. Glanvil, who wrote in the reign of Henry the ſecond, ſpeaking of the particular amount of an amercement in the ſheriff's court, ſays, it had never been yet aſcertained by the general aſſiſe, or aſſembly, but was left to the cuſtom of particular counties [g]. Here the general aſſiſe is ſpoken of as a meeting well known, and it's ſtatutes or deciſions are put in a manifeſt contradiſtinction to cuſtom, or the common law. [149] And in Edward the third's time an act of parliament, made in the reign of William the conqueror, was pleaded in the caſe of the abbey of St. Edmund's-bury, and judicially allowed by the court [h].

HENCE it indiſputably appears, that parliaments, or general councils, are coeval with the kingdom itſelf. How thoſe parliaments were conſtituted and compoſed, is another queſtion, which has been matter of great diſpute among our learned antiquaries; and, particularly, whether the commons were ſummoned at all; or if ſummoned, at what period they began to form a diſtinct aſſembly. But it is not my intention here to enter into controverſies of this ſort. I hold it ſufficient that it is generally agreed, that in the main the conſtitution of parliament, as it now ſtands, was marked out ſo long ago as the ſeventeenth year of king John, *A. D.* 1215, in the great charter granted by that prince; wherein he promiſes to ſummon all archbiſhops, biſhops, abbots, earls, and greater barons, perſonally; and all other tenants in chief under the crown, by the ſheriff and bailiffs; to meet

[g] *Quanta eſſe debeat per nullam aſſiſam generalem determinatum eſt, ſed pro conſuetudine ſingulorum comitatuum debetur. l.* 9. c. 10.

[h] Year book. 21 Edw. III. 60.

at a certain place, with forty days notice, to aſſeſs aids and ſcutages when neceſſary. And this conſtitution has ſubſiſted in fact at leaſt from the year 1266, 49 Hen. III: there being ſtill extant writs of that date, to ſummon knights, citizens, and burgeſſes to parliament (2). I proceed therefore to inquire wherein conſiſts this conſtitution of parliament, as it now ſtands, and has ſtood for the ſpace of at leaſt five hundred years. And in the proſecution of this inquiry, I ſhall conſider, firſt, the manner and time of it's aſſembling: ſecondly, its conſtituent parts: thirdly, the laws and cuſtoms relating to parliament, conſidered as one aggregate body: fourthly and fifthly, the laws and cuſtoms relating to each houſe ſeparately and diſtinctly taken: ſixthly, the methods of proceeding, and of making ſtatutes, in both houſes: and laſtly, the manner of the parliament's adjournment, prorogation, and diſſolution.

[150] I. As to the manner and time of aſſembling. The parliament is regularly to be ſummoned by the king's writ or letter, iſſued out of chancery by advice of the privy council, at leaſt forty days before it begins to ſit (3). It is a branch of the royal prerogative, that no parliament can be convened by it's own authority, or by the authority of any, except the king alone. And this prerogative is founded upon very good reaſon. For, ſuppoſing it had a right to meet ſpontaneouſly, without being

(2) The origin and progreſs of parliaments and our conſtitution will be diſcuſſed at large in the ſupplemental volume.

(3) This is a proviſion of the magna charta of king John: *faciemus ſummoneri, &c. ad certum diem ſcilicet ad terminum quadraginta dierum ad minus et ad certum locum.* (Black. Mag. Ch. Joh. 14.) It is enforced by 7 & 8 W. c. 25. which enacts that there ſhall be forty days between the teſte and the return of the writ of ſummons; and this time is by the uniform practice ſince the union extended to fifty days. (2 *Hatſ.* 235.) This practice was introduced by the 22d article of the act of union, which required that time between the teſte and the return of the writ of ſummons for the firſt parliament of Great Britain.

called

called together, it is impoſſible to conceive that all the members, and each of the houſes, would agree unanimouſly upon the proper time and place of meeting; and if half of the members met, and half abſented themſelves, who ſhall determine which is really the legiſlative body, the part aſſembled, or that which ſtays away? It is therefore neceſſary that the parliament ſhould be called together at a determinate time and place; and highly becoming it's dignity and independence, that it ſhould be called together by none but one of it's own conſtituent parts: and, of the three conſtituent parts, this office can only appertain to the king; as he is a ſingle perſon, whoſe will may be uniform and ſteady; the firſt perſon in the nation, being ſuperior to both houſes in dignity; and the only branch of the legiſlature that has a ſeparate exiſtence, and is capable of performing any act at a time when no parliament is in being [1]. Nor is it an exception to this rule that, by ſome modern ſtatutes, on the demiſe of a king or queen, if there be then no parliament in being, the laſt parliameat revives, and it is to ſit again for ſix months, unleſs diſſolved by the ſucceſſor: for this revived parliament muſt have been originally ſummoned by the crown (4).

IT is true, that by a ſtatute, 16 Car. I. c. 1. it was enact- [151]
ed, that, if the king neglected to call a parliament for three years, the peers might aſſemble and iſſue out writs for chooſing one; and, in caſe of neglect of the peers, the conſtituents might meet and elect one themſelves. But this, if

[1] By motives ſomewhat ſimilar to theſe the republic of Venice was actuated, when towards the end of the ſeventh century it aboliſhed the tribunes of the people, who were annually choſen by the ſeveral diſtricts of the Venetian territory, and conſtituted a doge in their ſtead; in whom the executive power of the ſtate at preſent reſides. For which their hiſtorians have aſſigned theſe, as the principal reaſons. 1. The propriety of having the executive power a part of the legiſlative, or ſenate; to which the former annual magiſtrates were not admitted. 2. The neceſſity of having a ſingle perſon to convoke the great council when ſeparated. (Mod. Un. Hiſt. xxvii. 15.)

(4) See p. 188.

ever

ever put in practice, would have been liable to all the inconveniencies I have just now ſtated: and the act itſelf was eſteemed ſo highly detrimental and injurious to the royal prerogative, that it was repealed by ſtatute 16 Car. II. c. 1. From thence therefore no precedent can be drawn.

It is alſo true, that the convention-parliament, which reſtored king Charles the ſecond, met above a month before his return; the lords by their own authority, and the commons in purſuance of writs iſſued in the name of the keepers of the liberty of England by authority of parliament: and that the ſaid parliament ſat till the twenty-ninth of December, full ſeven months after the reſtoration; and enacted many laws, ſeveral of which are ſtill in force. But this was for the neceſſity of the thing, which ſuperſedes all law; for if they had not ſo met, it was morally impoſſible that the kingdom ſhould have been ſettled in peace. And the firſt thing done after the king's return was to paſs an act declaring this to be a good parliament, notwithſtanding the defect of the king's writs [i]. So that, as the royal prerogative was chiefly wounded by their ſo meeting, and as the king himſelf, who alone had a right to object, conſented to wave the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Beſides we ſhould alſo remember, that it was at that time a great doubt among the lawyers [k], whether even this healing act made it a good parliament; and held by very many in the negative: though it ſeems to have been too nice a ſcruple (5). And yet, out of abundant caution, it was thought neceſſary to confirm it's acts in the next parliament, by ſtatute 13 Car. II. c. 7. & c. 14.

[i] Stat. 12 Car. II. c. 1. [k] 1 Sid. 1.

(5) William Drake, a merchant of London, was impeached for writing a pamphlet intitled, *The Long Parliament revived*, in which he maintained, that there could be no legiſlative authority till that was legally and regularly diſſolved by the king and the two houſes of parliament, according to the 16 Car. I. c. 7. *Com. Jour.* 20 Nov. 1660.

It is likewiſe true, that at the time of the revolution, *A. D.* 1688, the lords and commons by their own authority, and upon the ſummons of the prince of Orange, (afterwards king William,) met in a convention, and therein diſpoſed of the crown and kingdom. But it muſt be remembered, that this aſſembling was upon a like principle of neceſſity as at the reſtoration; that is, upon a full conviction that king James the ſecond had abdicated the government, and that the throne was thereby vacant: which ſuppoſition of the individual members was confirmed by their concurrent reſolution, when they actually came together. And, in ſuch a caſe as the palpable vacancy of a throne, it follows *ex neceſſitate rei*, that the form of the royal writs muſt be laid aſide, otherwiſe no parliament can ever meet again. For, let us put another poſſible caſe, and ſuppoſe, for the ſake of argument, that the whole royal line ſhould at any time fail and become extinct, which would indiſputably vacate the throne: in this ſituation it ſeems reaſonable to preſume, that the body of the nation, conſiſting of lords and commons, would have a right to meet and ſettle the government; otherwiſe there muſt be no government at all. And upon this and no other principle did the convention in 1688 aſſemble. The vacancy of the throne was precedent to their meeting without any royal ſummons, not a conſequence of it. They did not aſſemble without writ, and then make the throne vacant; but, the throne being previouſly vacant by the king's abdication, they aſſembled without writ, as they muſt do if they aſſembled at all. Had the throne been full, their meeting would not have been regular; but as it was really empty, ſuch meeting became abſolutely neceſſary. And accordingly it is declared by ſtatute 1 W. & M. ſt. 1. c. 1. that this convention was really the two houſes of parliament, notwithſtanding the want of writs or other defects of form. So that, notwithſtanding theſe two capital exceptions, which were juſtifiable only on a principle of neceſſity, (and each of which, by the way, induced a revolution in the government,) the rule laid down is in general certain, that the king, only, can convoke a parliament.

AND

AND this by the antient ſtatutes of the realm [1] he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by theſe ſtatutes to call a *new* parliament every year; but only to permit a parliament to ſit annually for the redreſs of grievances, and diſpatch of buſineſs, *if need be* (6). Theſe laſt words are ſo looſe and vague, that ſuch of

[1] 4 Edw. III. c. 14. 36 Edw. III. c. 10.

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(6) Mr. Granville Sharp, in a treatiſe publiſhed ſome years ago, argued ingeniouſly againſt this conſtruction of the 4 Ed: III. and maintained that the words, *if need be*, referred only to the preceding word, *oftener*. So that the true ſignification was, that a parliament ſhould be held once every year at all events; and if there ſhould be any need to hold it oftener, then more than once. (See his Declaration, &c. p. 166.) The cotemporary records of parliament, in ſome of which it is ſo expreſſed without any ambiguity, prove beyond all controverſy that this is the true conſtruction. In antient times many favourite laws were frequently re-enacted. In the 50 Ed. III. it is expreſsly and abſolutely declared, that a parliament ſhould be held once a year. (*Rot. Parl.* No. 186.) In the 1 R. II. we find again another petition from the commons, that a parliament ſhould be held once a year *at the leaſt*: "*Que* "*pleſe a nre dit Sr de tenir parlement un foetz par an au meynz, et* "*ceo en lieu convenable.*" The king's anſwer is, "As to that "parliament ſhall be held every year, let the ſtatutes thereupon "be kept and preſerved; but as to the place where the parliament "ſhall be held, the king will therein do his pleaſure." (*Rot. Parl.* No. 95.) And in the next year, the king declared he had ſummoned the parliament, becauſe it was ordained that parliament ſhould be held once a year. (*Rot. Parl.* 2 R. II. No. 4.)

But I can by no means agree with Mr. Sharp, and thoſe who contend that it is the meaning of theſe records and ſtatutes that there ſhould be an election every year. The word parliament at that time did not neceſſarily include any ſuch idea; for it is every where applied to a ſeſſion without any diſtinction, whether it was held after a prorogation or a diſſolution. (*Rot. Parl. paſſim.*) It is true that for ſome time after the houſe of commons was regularly eſtabliſhed diſſolutions were frequent; for at that time the electors

our monarchs as were inclined to govern without parliaments, neglected the convoking them ſometimes for a very conſiderable period, under pretence that there was no need of them. But, to remedy this, by the ſtatute 16 Car. II. c. 1. it is enacted, that the ſitting and holding of parliaments ſhall not be intermitted above three years at the moſt. And by the ſtatute 1 W. & M. ſt. 2, c. 2. it is declared to be one of the rights of the people, that for redreſs of all grievances, and for the amending, ſtrengthening, and preſerving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency* is again reduced to a certainty by ſtatute 6 W. & M. c. 2. which enacts, as the ſtatute of Charles the ſecond had

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electors were few, and a ſeat in parliament was conſidered rather a burden to be avoided than a diſtinction to be ſolicited; and the members were not enabled to recover their wages till the king had diſcharged them from further attendance, by putting an end to the parliament. In the firſt reigns after the repreſentation of the commons was eſtabliſhed, the duration and intermiſſions of parliaments were ſhort; but for ſeveral reigns preceding the revolution, both had become extended to ſuch a length, that it became neceſſary for the parliament to interpoſe it's authority, and fix ſome limits to it's own exiſtence.

In the following reigns, the longeſt durations and intermiſſions were nearly as follows:

	Duration.	Intermiſſion.
Hen. VIII.	6 years.	6 years.
Edw. VI.	4	—
Eliz.	11	4
Ja. I.	9	6
Ch. I.	8	12
Ch. II.	17	4

See the printed Report of the Committee to examine Precedents in Impeachments, 19 April 1791, (p. 16. *et ſeq.*). In Ireland there was no regular meeting of the parliament from 1666 till 1692; and from the reign of Queen Anne in 1703, it aſſembled only once in two years, till 1783; ſince which time it has ſat every year as in England. (*Lord Mountmor.* 419.)

done

done before, that a new parliament shall be called within three years [m] after the determination of the former (7).

II. THE constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, (who sit, together with the king, in one house) and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom [n], of which the king is said to be *caput, principium, et finis*. For upon their coming together the king meets them, either in person or by representation; without which there can be no beginning of a parliament [o]; and he also has alone the power of dissolving them.

[154] IT is highly necessary for preserving the balance of the constitution, that the executive power should be a branch,

[m] This is the same period, that is allowed in Sweden and intermitting their general diets, or parliamentary assemblies. Mod. Un. Hist. xxxiii. 15.

[n] 4 Inst. 1, 2. Stat. 1 Eliz. c. 3.

[o] 4 Inst. 6.

(7) This part of the statute 6 W. & M. c. 2. confirms the statute 16 Car. II. c. 1. in declaring, that there shall not be a longer interval than three years after a dissolution; but the 16 Car. II. seems to be more extensive in it's operation, by providing that there shall not be an intermission of more than three years after any sitting of parliament, which will extend also to a prorogation. But as the mutiny act, and the land-tax and malt-tax acts are passed for one year only, these two statutes are now of little avail, for the parliament must necessarily be summoned for the dispatch of business once every year. In ancient times, especially before the abolition of the feudal tenures at the restoration of Ch. II, our kings had such a revenue, independent of parliament, that they were enabled to reign many years together without the assistance of parliament, and in defiance of the statutes mentioned in the preceding note.

though

though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the first, while it acted in a constitutional manner, with the royal concurrence, redressed many heavy grievances and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done[f]. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without it's own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a [155] check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other

[f] *Sulla—tribunis plebis jus legis injuriæ faciendæ potestatem ademit, auxilii ferendi reliquit.* De Leg. 3. 9.

has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king, which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction, which constitutes the true line of the liberty and happiness of the community.

LET us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

THE next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops; and at the dissolution of monasteries by Henry VIII, consisted likewise of twenty-six mitred abbots, and two priors[f]; a very considerable body, and in those times equal in number to the temporal nobility (8). All these hold, or are supposed to hold, cer-

[f] Stat. 32 Car. II. c. 30. [g] Co. Litt. 97.
[h] Seld. de hon. 2. 5. 27.

(8) In the place referred to, lord Coke says, there were twenty-seven abbots and two priors, and he is there silent respecting

tain antient baronies under the king: for William the conqueror thought proper to change the ſpiritual tenure of frank-almoign or free alms, under which the biſhops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which ſubjected their eſtates to all civil charges and aſſeſſments, from which they were before exempt[s]: and, in right of ſucceſſion to thoſe baronies, which were unalienable from their reſpective dignities, the biſhops and abbots were allowed their ſeats in the houſe of lords[t]. But though theſe lords ſpiritual are in the eye of the law a diſtinct eſtate from the lords temporal, and are ſo diſtinguiſhed in moſt of our acts of parliament, yet in practice they are uſually blended together under the one name of *the lords*; they intermix in their votes; and the majority of ſuch intermixture joins both eſtates. And from this want of a ſeparate aſſembly and ſeparate negative of the prelates, ſome writers have argued[u] very cogently, that the lords ſpiritual and temporal are now in reality only one eſtate[w]: which is unqueſtionably true in every effectual ſenſe, though the antient diſtinction between them ſtill nominally continues. For if a bill ſhould paſs their houſe, there is no doubt of it's validity, though every lord ſpiritual ſhould vote againſt it; of which Selden[x], and

[s] Gilb. Hiſt. Exch. 55. Spelm. W. I. 291.

[t] Glanv. 7. 1. Co. Litt. 97. Seld. tit. hon. 2. 5. 19.

[u] Whitelocke on Parliam. c. 72. Warbert. Alliance. b. 2. c. 3.

[w] Dyer. 60.

[x] Baronage. p. 1. c. 6. The act of uniformity, 1 Eliz. c. 2. was paſſed with the diſſent of all the biſhops; (Gibſ. codex. 226.) and therefore the ſtile of *lords ſpiritual* is omitted throughout the whole (9).

ſpecting the number of the temporal peers; but in the firſt page of the 4th Inſtitute, he tells us their number, when he is then writing, is 106, and the number of the commons 493.

(9) No rational or ancient principle can perhaps be ſuggeſted, why the biſhops ſhould not have exactly the ſame legiſlative functions as the other peers of parliament; the ſtile of the houſe of lords, viz. the lords ſpiritual and temporal, was probably intended as a compliment to the biſhops, to expreſs the precedence which they are entitled to before all the temporal barons, which origi-

ſir Edward Coke[y], give many inſtances; as, on the other hand, I preſume it would be equally good, if the lords temporal preſent were inferior to the biſhops in number, and every one of thoſe temporal lords gave his vote to reject the bill; though ſir Edward Coke ſeems to doubt[z] whether this would not be an *ordinance*, rather than an *act*, of parliament.

[157] THE lords temporal conſiſt of all the peers of the realm (the biſhops not being in ſtrictneſs held to be ſuch, but merely lords of parliament[a]) by whatever title of nobility diſtinguiſhed; dukes, marquiſſes, earls, viſcounts, or barons; of which dignities we ſhall ſpeak more hereafter. Some of theſe ſit by deſcent, as do all ancient peers; ſome by creation, as do all new-made ones; others, ſince the union with Scotland, by election, which is the caſe of the ſixteen peers, who repreſent the body of the Scots nobility. Their number is indefinite, and may be encreaſed at will by the power of the crown: and once, in the reign of queen Anne, there was an

[y] 2 Inſt. 585, 6, 7. See Keilw. 184; where it is holden by the judges, 7 Hen. VIII. that the king may hold a parliament without any ſpiritual lords. This was alſo exemplified in fact in the two firſt parliaments of Charles II; wherein no biſhops were ſummoned, till after the repeal of the ſtatute 16 Car. I. c. 27. by ſtatute 13 Car. II. ſt. 1. c. 2.

[z] 4 Inſt. 25.

[a] Staunford, P. C. 153.

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nally was the only character that gave a claim to a ſeat in the houſe of lords. Unleſs precedents could be found to the contrary, there ſeems to be no reaſon to doubt, but that any act at this day would be valid, though all the temporal lords or all the ſpiritual lords were abſent.

In the 1 Eliz. c. 2. the ſtile of the parliament is, the lords and commons in parliament aſſembled; but there is the ſame ſtile uſed alſo in 1 Eliz. c. 11. a revenue act. Lord Mountmorres informs us, that on the 18th Feb. 1641, a motion was made in the Iriſh houſe of lords, "That as all the biſhops were againſt a repreſentation about certain grievances, the lords ſpiritual ſhould not be named: upon which the judges were conſulted; and their opinion was, that in any act or order which paſſed, it muſt be entered by the lords ſpiritual and temporal." 1 Vol. 344.

inſtance of creating no leſs than twelve together; in contemplation of which in the reign of king George the firſt, a bill paſſed the houſe of lords, and was countenanced by the then miniſtry, for limiting the number of the peerage. This was thought by ſome to promiſe a great acquiſition to the conſtitution, by reſtraining the prerogative from gaining the aſcendant in that auguſt aſſembly, by pouring in at pleaſure an unlimited number of new created lords. But the bill was ill-reliſhed and miſcarried in the houſe of commons, whoſe leading members were then deſirous to keep the avenues to the other houſe as open and eaſy as poſſible.

THE diſtinction of rank and honour is neceſſary in every well-governed ſtate: in order to reward ſuch as are eminent for their ſervices to the public, in a manner the moſt deſirable to individuals, and yet without burden to the community; exciting thereby an ambitious yet laudable ardor, and generous emulation, in others. And emulation, or virtuous ambition, is a ſpring of action, which, however dangerous or invidious in a mere republic or under a deſpotic ſway, will certainly be attended with good effects under a free monarchy; where, without deſtroying it's exiſtence, it's exceſſes may be continually reſtrained by that ſuperior power, from which all honour is derived. Such a ſpirit, when nationally diffuſed, gives life and vigour to the community; it ſets all the wheels of government in motion, which, under a wiſe regulator, may be directed to any bene- [158]
ficial purpoſe; and thereby every individual may be made ſubſervient to the public good, while he principally means to promote his own particular views. A body of nobility is alſo more peculiarly neceſſary in our mixed and compounded conſtitution, in order to ſupport the rights of both the crown and the people, by forming a barrier to withſtand the encroachments of both. It creates and preſerves that gradual ſcale of dignity, which proceeds from the peaſant to the prince; riſing like a pyramid from a broad foundation, and diminiſhing to a point as it riſes. It is this aſcending and contracting proportion that adds ſtability to any government;

for when the departure is ſudden from one extreme to another, we may pronounce that ſtate to be precarious. The nobility therefore are the pillars, which are reared from among the people, more immediately to ſupport the throne; and, if that falls, they muſt alſo be buried under it's ruins. Accordingly, when in the laſt century the commons had determined to extirpate monarchy, they alſo voted the houſe of lords to be uſeleſs and dangerous. And ſince titles of nobility are thus expedient in the ſtate, it is alſo expedient that their owners ſhould form an independent and ſeparate branch of the legiſlature. If they were confounded with the maſs of the people, and like them had only a vote in electing repreſentatives, their privileges would ſoon be borne down and overwhelmed by the popular torrent, which would effectually level all diſtinctions. It is therefore highly neceſſary that the body of nobles ſhould have a diſtinct aſſembly, diſtinct deliberations, and diſtinct powers from the commons.

THE commons conſiſt of all ſuch men of property in the kingdom (10), as have not ſeats in the houſe of lords; every one of which has a voice in parliament, either perſonally, or by his repreſentatives. In a free ſtate every man, who is ſuppoſed a free agent, ought to be in ſome meaſure his own governor; and therefore a branch at leaſt of the legiſlative power ſhould reſide in the whole body of the people. And this power, when the territories of the ſtate are ſmall and it's citizens eaſily known, ſhould be exerciſed by the people
[159] in their aggregate or collective capacity, as was wiſely ordained in the petty republics of Greece, and the firſt rudiments of the Roman ſtate. But this will be highly inconvenient, when the public territory is extended to any conſi-

(10) The word commons in it's preſent ordinary ſignification, comprizes all the people who are under the rank of peers, without any regard to property; but, in it's original ſignification, it was confined to thoſe only who had a right to ſit, or had a right to vote for repreſentatives in the houſe of commons.

derable

derable degree, and the number of citizens is encreaſed. Thus when, after the ſocial war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public aſſemblies, it became impoſſible to diſtinguiſh the ſpurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and diſorderly; which paved the way for Marius and Sylla, Pompey and Cæſar, to trample on the liberties of their country, and at laſt to diſſolve the commonwealth. In ſo large a ſtate as ours it is therefore very wiſely contrived, that the people ſhould do that by their repreſentatives, which it is impracticable to perform in perſon; repreſentatives, choſen by a number of minute and ſeparate diſtricts, wherein all the voters are, or eaſily may be, diſtinguiſhed. The counties are therefore repreſented by knights, elected by the proprietors of lands: the citizens and boroughs are repreſented by citizens and burgeſſes, choſen by the mercantile part or ſuppoſed trading intereſt of the nation; much in the ſame manner as the burghers in the diet of Sweden are choſen by the corporate towns, Stockholm ſending four, as London does with us, other cities two, and ſome only one [b]. The number of Engliſh repreſentatives is 513, and Scots 45; in all 558. And every member, though choſen by one particular diſtrict, when elected and returned ſerves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his conſtituents, but the *common* wealth; to adviſe his majeſty (as appears from the writ of ſummons [c]) "*de communi conſilio ſuper negotiis quibuſdam arduis et urgentibus, regem, ſtatum, et defenſionem regni Angliae et eccleſiae Anglicanae concernentibus.*" And therefore he is not bound, like a deputy in the united provinces, to conſult with, or take the advice of, his conſtituents upon any particular point, unleſs he himſelf thinks it proper or prudent ſo to do.

THESE are the conſtituent parts of a parliament; the king, [160] the lords ſpiritual and temporal, and the commons. Parts, of which each is ſo neceſſary, that the conſent of all three is required

[b] Mod. Un. Hiſt. xxxiii. 18. [c] 4 Inſt. 14.

quired to make any new law that ſhall bind the ſubject. Whatever is enacted for law by one, or by two only, of the three is no ſtatute; and to it no regard is due, unleſs in matters relating to their own privileges. For though, in the times of madneſs and anarchy, the commons once paſſed a vote[d], "that whatever is enacted or declared for law by the "commons in parliament aſſembled hath the force of law; "and all the people of this nation are concluded thereby, "although the conſent and concurrence of the king or houſe "of peers be not had thereto (11);" yet, when the conſtitution was reſtored in all it's forms, it was particularly enacted by ſtatute 13 Car. II. c. 1. that if any perſon ſhall maliciouſly or adviſedly affirm that both or either of the houſes of parliament have any legiſlative authority without the king, ſuch perſon ſhall incur all the penalties of a *præmunire*.

III. WE are next to examine the laws and cuſtoms relating to parliament, thus united together and conſidered as one aggregate body.

THE power and juriſdiction of parliament, ſays ſir Edward Coke[e], is ſo tranſcendent and abſolute, that it cannot be confined, either for cauſes or perſons, within any bounds. And of this high court, he adds, it may be truly ſaid, "*ſi antiquitatem ſpectes, eſt vetuſtiſſima; ſi dignitatem, eſt honoratiſſima; ſi juriſdictionem, eſt capatiſſima.*" It hath ſovereign and uncontrolable authority in the making, confirming, enlarging, reſtraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all poſſible denominations, eccleſiaſtical, or temporal, civil, military, maritime, or criminal: this being the place where that abſolute deſpotic power, which muſt in all governments reſide ſomewhere, is intruſted

[d] 4 Jan. 1648. [e] 4 Inſt. 36.

(11) This was a natural prologue to the tragical drama which was performed on the 30th of the ſame month.

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by the conſtitution of theſe kingdoms. All miſchiefs and grievances, operations and remedies, that tranſcend the ordinary courſe of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the ſucceſſion to the crown; as was done in the reign of Henry VIII and William III. It can alter the eſtabliſhed religion of the land; as was done in a variety of inſtances, in the reigns of king Henry VIII and his three children. It can change and create afreſh even the conſtitution of the kingdom and of parliaments themſelves; as was done by the act of union, and the ſeveral ſtatutes for triennial and ſeptennial elections. It can, in ſhort, do every thing that is not naturally impoſſible; and therefore ſome have not ſcrupled to call it's power, by a figure rather too bold, the omnipotence of parliament (12). True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter moſt eſſential to the liberties of this kingdom, that ſuch members be delegated to this important truſt, as are moſt eminent for their probity, their fortitude, and their knowlege; for it was a known apophthegm of the great lord treaſurer Burleigh, "that England could never be ruined but by a parliament:" and, as ſir Matthew Hale obſerves[f], this being the higheſt and greateſt court, over which none other can have juriſdiction in the kingdom, if by any means a miſgovernment ſhould any way fall upon it, the ſubjects of this kingdom are left without all manner of remedy. To the ſame purpoſe the [161]

[f] of parliaments, 49.

(12) De Lolme has improved upon this, and has, I think, unwarrantably aſſerted, that "it is a fundamental principle with the "Engliſh lawyers, that parliament can do every thing but make "a woman a man, and a man a woman." (p. 134.) The omnipotence of parliament ſignifies nothing more than the ſupreme ſovereign power of the ſtate, or a power of action uncontrolled by any ſuperior. In this ſenſe, the king in the exerciſe of his prerogatives, and the houſe of lords in the interpretation of laws, are alſo omnipotent; that is, free from the control of any ſuperior provided by the conſtitution.

preſident Monteſquieu, though I truſt too haſtily, preſages[g], that as Rome, Sparta, and Carthage have loſt their liberty and periſhed, ſo the conſtitution of England will in time loſe it's liberty, will periſh: it will periſh, whenever the legiſlative power ſhall become more corrupt than the executive.

IT muſt be owned that Mr. Locke[h], and other theoretical writers, have held, that "there remains ſtill inherent in the "people a ſupreme power to remove or alter the legiſlative, "when they find the legiſlative act contrary to the truſt re-"poſed in them: for, when ſuch truſt is abuſed, it is thereby "forfeited, and devolves to thoſe who gave it." But however juſt this concluſion may be in theory, we cannot practi-
[162] cally adopt it, nor take any *legal* ſteps for carrying it into execution, under any diſpenſation of government at preſent actually exiſting. For this devolution of power, to the people at large, includes in it a diſſolution of the whole form of government eſtabliſhed by that people; reduces all the members to their original ſtate of equality; and, by annihilating the ſovereign power, repeals all poſitive laws whatſoever before enacted. No human laws will therefore ſuppoſe a caſe, which at once muſt deſtroy all law, and compel men to build afreſh upon a new foundation; nor will they make proviſion for ſo deſperate an event, as muſt render all legal proviſions ineffectual[i]. So long therefore as the Engliſh conſtitution laſts, we may venture to affirm, that the power of parliament is abſolute and without control.

IN order to prevent the miſchiefs that might ariſe, by placing this extenſive authority in hands that are either incapable, or elſe improper, to manage it, it is provided by the cuſtom and law of parliament[j], that no one ſhall ſit or vote in either houſe, unleſs he be twenty-one years of age. This is alſo expreſsly declared by ſtatute 7 & 8 W. III. c. 25. with regard to the houſe of commons; doubts having ariſen,

[g] Sp. L. 11: 6.
[h] on Gov. p. 2. § 149. 227.
[i] See page 144.
[j] Whitlocke, c. 50. 4 Inſt. 47.

from

from ſome contradictory adjudications, whether or no a minor was incapacitated from ſitting in that houſe[k] (13). It is alſo enacted by ſtatute 7 Jac. I. c. 6. that no member be permitted to enter into the houſe of commons, till he hath taken the oath of allegiance before the lord ſteward or his deputy (14): and by 30 Car. II. ſt. 2. and 1 Geo. I. c. 13. (15) that no member ſhall vote or ſit in either houſe, till he hath in the preſence of the houſe taken the oath of allegiance, ſupremacy, and abjuration, and ſubſcribed and repeated the declaration againſt tranſubſtantiation, and invocation of ſaints, and the ſacrifice of the maſs. Aliens, unleſs naturalized, were likewiſe by the law of parliament incapable to ſerve therein[l]: and now it is enacted, by ſtatute 12 & 13 W. III. c. 2. that no alien, even though he be naturalized, ſhall be capable of being a member of either houſe of parliament. And there are not only theſe ſtanding incapacities; but if any perſon is made a [163] peer by the king, or elected to ſerve in the houſe of commons by the people, yet may the reſpective houſes upon complaint of any crime in ſuch perſon, and proof thereof, adjudge him

[k] Com. Journ. 16 Dec. 1690. [l] Com. Journ. 10 Mar. 1623. 18 Feb. 1625.

(13) According to ancient principles, minors, unleſs actually knighted, muſt have been diſqualified; for, in general, no one was capable of performing the feudal ſervices till he had attained the age of twenty-one. And one of the moſt important of theſe ſervices was, attendance on the lord's court. But if the king had conferred the honour of knighthood upon a minor, then it was held that the imbecility of minority ceaſed. See note to p. 68. 2d vol.

(14) On the firſt day of the meeting of every new parliament, the lord ſteward of his majeſty's houſehold attends in a room adjoining to the houſe of commons, and adminiſters an oath to the members preſent; and he then executes a commiſſion or deputation, empowering any one or more of a great number of members ſpecified in it, to adminiſter the oath to others. *Com. Jour.*

(15) The oath of abjuration was altered by 6 Geo. III. c. 53. upon the death of the pretender.

disabled and incapable to ſit as a member [m]: and this by the law and cuſtom of parliament (16).

[m] Whitelocke of parl. c. 102. See 14 Feb. 1580. 21 Jun. 1628. 9 Nov. Lord's Journ. 3 May 1620. 13 May 21 Jan. 1640. 6 Mar. 1676. 6 Mar. 1624. 26 May 1725. Com. Journ. 1711. 17 Feb. 1769.

(16) This ſentence was not in the firſt editions, but was added, no doubt, by the learned Judge, with an alluſion to the Middleſex election. The circumſtances of that caſe were briefly theſe: On the 19 Jan. 1764, Mr. Wilkes was expelled the houſe of commons, for being the author of a paper called the North Briton, No. 45. At the next election, in 1768, he was elected for the county of Middleſex; and on 3 Feb. 1769, it was reſolved that John Wilkes, Eſq. having publiſhed ſeveral libels ſpecified in the Journals, *be expelled this houſe*; and a new writ having been ordered for the county of Middleſex, Mr. Wilkes was re-elected without oppoſition; and on the 17 Feb. 1769, it was reſolved, that "John Wilkes, Eſq. having been in this ſeſſion of parliament expelled this houſe, was and is incapable of being elected "a member to ſerve in this preſent parliament;" and the election was declared void, and a new writ ordered. He was a ſecond time re-elected without oppoſition, and on 17 March 1769, the houſe again declared the election void, and ordered a new writ. At the next election, Mr. Luttrell, who had vacated his ſeat by accepting the Chiltern Hundreds, offered himſelf a candidate againſt Mr. Wilkes. Mr. Wilkes had 1143 votes, and Mr. Luttrel 296. Mr. Wilkes was again returned by the ſheriff. On the 15 April 1769, the houſe reſolved, that Mr. Luttrel ought to have been returned, and ordered the return to be amended. On the 29 April, a petition was preſented by certain freeholders of Middleſex, againſt the return of Mr. Luttrel; and on the 8 May, the houſe reſolved that Mr. Luttrel was duly elected. On the 3 May 1783, it was reſolved, that the reſolution of the 17 Feb. 1769 ſhould be expunged from the Journals of the houſe, as being ſubverſive of the rights of the whole body of electors of this kingdom. And at the ſame time it was ordered, that all the declarations, orders, and reſolutions reſpecting the election of John Wilkes, Eſq. ſhould be expunged. The hiſtory of England furniſhes many inſtances of important conſtitutional queſtions that have deeply agitated the minds of the people of this country,

FOR, as every court of juſtice hath laws and cuſtoms for it's direction, ſome the civil and canon, ſome the common law, others their own peculiar laws and cuſtoms, ſo the high court of parliament hath alſo it's own peculiar law, called the *lex et conſuetudo parliamenti*; a law which ſir Edward Coke [n] obſerves is, "*ab omnibus quaerenda, a multis ignorata* (17) "*a paucis cognita.*" It will not therefore be expected that we ſhould enter into the examination of this law, with any degree of minuteneſs: ſince, as the ſame learned author aſſures us [o], it is much better to be learned out of the rolls of parliament, and other records, and by precedents, and continual experience, than can be expreſſed by any one man. It will be ſufficient to obſerve, that the whole of the law and cuſtom of parliament has it's original from this one maxim, "that "whatever matter ariſes concerning either houſe of parliament, ought to be examined, diſcuſſed, and adjudged in

[n] 1 Inſt. 11. [o] 4 Inſt. 50.

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country, which can raiſe little or no doubt in the minds of thoſe who view them at a diſtance uninfluenced by intereſt or paſſion. It might perhaps be a violent meaſure in the houſe of commons to expel a member for the libels which he had publiſhed; but that the ſubſequent proceedings were agreeable to the law of parliament, that is, to the law of the land, the authorities here referred to by the learned Judge, I conceive, do moſt unanſwerably prove. It is ſuppoſed that the reſolution of the 17 Feb. 1769, was conſidered to be ſubverſive of the rights of electors, becauſe it aſſigned expulſion alone, without ſtating the criminality of the member to be the cauſe of his incapacity during that parliament. But as his offences were particularly deſcribed in the reſolution by which he was expelled on the 3d of the ſame month, no one could poſſibly doubt but the latter reſolution had as clear a reference to the former, as if it had been repeated in it word for word.

(17) Lord Holt has obſerved, that "as to what my lord Coke "ſays, that the *lex parliamenti eſt a multis ignorata*, is only becauſe "they will not apply themſelves to underſtand it." 2 *Ld. Ray.* 1114.

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"that houſe to which it relates, and not elſewhere [p]." Hence, for inſtance, the lords will not ſuffer the commons to interfere in ſettling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgeſs; nor will either houſe permit the ſubordinate courts of law to examine the merits of either caſe. But the maxims upon which they proceed, together with the method of proceeding, reſt entirely in the breaſt of the parliament itſelf; and are not defined and aſcertained by any particular ſtated laws (18).

[164] THE *privileges* of parliament are likewiſe very large and indefinite. And therefore when in 31 Hen. VI. the houſe of lords propounded a queſtion to the judges concerning them, the chief juſtice, ſir John Forteſcue, in the name of his brethren, declared, "that they ought not to make anſwer "to that queſtion: for it hath not been uſed aforetime that

[p] 4 Inſt. 15.

(18) This ſentence ſeems to imply a diſcretionary power in the two houſes of parliament, which ſurely is repugnant to the ſpirit of our conſtitution. The law of parliament is part of the general law of the land, and muſt be diſcovered and conſtrued like all other laws. The members of the reſpective houſes of parliament are in moſt inſtances the judges of that law; and like the judges of the realm, when they are deciding upon paſt laws, they are under the moſt ſacred obligation to enquire and decide what the law actually is, and not what, in their will and pleaſure, or even in their reaſon and wiſdom, it ought to be. When they are declaring what is the law of parliament, their character is totally different from that with which, as legiſlators, they are inveſted when they are framing new laws; and they ought never to forget the admonition of that great and patriotic chief juſtice lord Holt, viz. "that "the authority of parliament is from the law, and as it is circumſcribed by law, ſo it may be exceeded; and if they do exceed "thoſe legal bounds and authority, their acts are wrongful, and "cannot be juſtified any more than the acts of private men." 1 *Salk.* 505.

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"the juſtices ſhould in any wiſe determine the privileges of "the high court of parliament. For it is ſo high and mighty "in it's nature, that it may make law: and that which is "law, it may make no law: and the determination and "knowlege of that privilege belongs to the lords of parlia-"ment, and not to the juſtices [q]." Privilege of parliament was principally eſtabliſhed, in order to protect its members not only from being moleſted by their fellow-ſubjects, but alſo more eſpecially from being oppreſſed by the power of the crown. If therefore all the privileges of parliament were once to be ſet down and aſcertained, and no privilege to be allowed but what was ſo defined and determined, it were eaſy for the executive power to deviſe ſome new caſe, not within the line of privilege, and under pretence thereof to haraſs any refractory member and violate the freedom of parliament. The dignity and independence of the two houſes are therefore in great meaſure preſerved by keeping their privileges indefinite (19). Some however of the more notorious privileges of the members of either houſe are, privilege of ſpeech, of perſon, of their domeſtics, and of their lands and

[q] Seld. Baronage, part 1. c. 4.

(19) In the obſervations above, upon the privileges of parliament, the Editor is obliged to differ from the learned Judge; he cannot but think that clearneſs and certainty are eſſentially neceſſary to the liberty of Engliſhmen. Myſtery and ignorance are the natural parents of ſuperſtition and ſlavery. How can rights and privileges be claimed and aſſerted, unleſs they are aſcertained and defined? The privileges of parliament, like the prerogatives of the crown, are the rights and privileges of the people. They ought all to be limited by thoſe boundaries which afford the greateſt ſhare of ſecurity to the ſubject and conſtituent, who may be equally injured by their extenſion as their diminution. The privileges of the two houſes ought certainly to be ſuch as will beſt preſerve the dignity and independence of their debates and councils without endangering the general liberty. But if they are left uncertain and indefinite, may it not be replied with equal force, that under the pretence thereof the refractory members may haraſs the executive power, and violate the freedom of the people?

goods.

goods (20). As to the firſt, privilege of ſpeech, it is declared by the ſtatute 1 W. & M. ſt. 2. c. 2. as one of the liberties of the people, "that the freedom of ſpeech, and debates, and "proceedings in parliament, ought not to be impeached or "queſtioned in any court or place out of parliament." And this freedom of ſpeech is particularly demanded of the king in perſon, by the ſpeaker of the houſe of commons, at the opening of every new parliament. So likewiſe are the other privileges, of perſons, ſervants, lands and goods: which are immunities as ancient as Edward the confeſſor; in whoſe laws[r] we find this precept, "*ad ſynodos venientibus, ſive ſummoniti*
[165] "*ſint, ſive per ſe quid agendum habuerint, ſit ſumma pax:*" and ſo too, in the old Gothic conſtitutions, "*extenditur haec pax* "*et ſecuritas ad quatuordecim dies, convocato regni ſenatu*[s]." This included formerly not only privilege from illegal violence, but alſo from legal arreſts, and ſeiſures by proceſs from the courts of law. And ſtill, to aſſault by violence a member of either houſe, or his menial ſervants, is a high contempt of parliament, and there puniſhed with the utmoſt ſeverity. It has likewiſe peculiar penalties annexed to it in the courts of law, by the ſtatutes 5 Hen. IV. c. 6. and 11 Hen. VI. c. 11. Neither can any member of either houſe be arreſted and taken into cuſtody, unleſs for ſome indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right, are now at an end, ſave only as to the freedom of the member's perſon: which in a peer (by the privilege of peerage) is for ever ſacred and inviolable; and in a commoner (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting[t]: which is now in effect as long as the parliament ſubſiſts, it ſeldom being prorogued for more

[r] *cap.* 3. [s] Steiran. *de jure Goth. l.* 3. *c.* 3. [t] 2 Lev. 72.

(20) The privileges of domeſtics, lands, and goods, are taken away by 10 Geo. III. c. 50. (See p. 165.)

than

than fourſcore days at a time (21). As to all other privileges, which obſtruct the ordinary courſe of juſtice, they were reſtrained by the ſtatutes 12 W. III. c. 3. 2 & 3 Ann. c. 18. and 11 Geo. II. c. 24. and are now totally aboliſhed by ſtatute 10 Geo. III. c. 50. which enacts, that any ſuit may at any time be brought againſt any peer or member of parliament, their ſervants, or any other perſon entitled to privilege of parliament; which ſhall not be impeached or delayed by pretence of any ſuch privilege; except that the perſon of a member of the houſe of commons ſhall not thereby be ſubjected to any arreſt of impriſonment. Likewiſe, for the benefit of commerce, it is provided by ſtatute 4 Geo. III. c. 33. that any trader, having privilege of parliament, may be ſerved with legal proceſs for any juſt debt to the amount of 100*l.* and unleſs he makes ſatisfaction within two months, it ſhall be deemed an act of bankruptcy; and that commiſſions of [166] bankrupt may be iſſued againſt ſuch privileged traders, in like manner as againſt any other.

THE only way by which courts of juſtice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a *ſuperſedeas*, to deliver the party out of cuſtody when arreſted in a civil ſuit [u]. For when a letter was written by the ſpeaker to the judges, to ſtay proceedings againſt a privileged perſon, they rejected it as contrary to their oath of office [v]. But ſince the ſtatute 12 W. III. c. 3. which enacts that no privileged perſon ſhall be ſubject to arreſt or impriſonment, it hath been held that

[u] Dyer 59. 4 Pryn. *Brev. Parl.* [v] Latch. 48. Noy. 83. 757.

(21) It does not appear that the privilege from arreſt is limited to any preciſe time after a diſſolution; but it is has been determined by all the judges that it extends to a convenient time. *(Col. Pit's caſe, 2 Str.* 988.) Prynne is of opinion that it continued for the number of days the member received wages after a diſſolution, which were in proportion to the diſtance between his home and the place where the parliament was held. 4 *Parl. Writs*, 68.

ſuch

ſuch arreſt is irregular *ab initio*, and that the party may be diſcharged upon motion [w]. It is to be obſerved, that there is no precedent of any ſuch writ of privilege, but only in civil ſuits; and that the ſtatute of 1 Jac. I. c. 13. and that of king William (which remedy ſome inconveniences ariſing from privilege of parliament) ſpeak only of civil actions. And therefore the claim of privilege hath been uſually guarded with an exception as to the caſe of indictable crimes [x]; or as it hath been frequently expreſſed, of treaſon, felony, and breach (or ſurety) of the peace [y]. Whereby it ſeems to have been underſtood that no privilege was allowable to the members, their families, or ſervants, in any *crime* whatſoever; for all crimes are treated by the law as being *contra pacem domini regis*. And inſtances have not been wanting, wherein privileged perſons have been convicted of miſdemeſnors, and committed, or proſecuted to outlawry, even in the middle of a ſeſſion [z]; which proceeding has afterwards received the ſanction and approbation of parliament [a]. To which may be added, that a few years ago, the caſe of writing and publiſhing ſeditious libels was reſolved by both
[167] houſes [b] not to be intitled to privilege (22); and that the reaſons upon which that caſe proceeded [c], extended equally to every indictable offence. So that the chief, if not the only privilege of parliament, in ſuch caſes, ſeems to be the right of receiving immediate information of the impriſonment or detention of any member, with the reaſon for which he is detained: a practice that is daily uſed upon the ſlighteſt military accuſations, preparatory to a trial by a court mar-

w Stra. 989.
x Com. Journ. 17 Aug. 1641.
y 4 Inſt. 25. Com. Journ. 20 May 1675.
z *Mich.* 16 *Edw. IV. in Scacch.*— Lord Raym. 1461.
a Com. Journ. 16 May 1726.
b Com. Journ. 24 Nov. Lords' Journ. 29 Nov. 1763.
c Lords' Proteſt. *ibid.*

(22) The contrary had been determined a ſhort time before in the caſe of Mr. Wilkes by the unanimous judgment of lord Camden and the court of Common Pleas. 2 *Wilſ.* 251.

tial;

tial[d]; and which is recognized by the ſeveral temporary ſtatutes for ſuſpending the *habeas corpus* act[e]; whereby it is provided, that no member of either houſe ſhall be detained, till the matter of which he ſtands ſuſpected be firſt communicated to the houſe of which he is a member, and the conſent of the ſaid houſe obtained for his commitment or detaining. But yet the uſage has uniformly been, ever ſince the revolution, that the communication has been ſubſequent to the arreſt.

THESE are the general heads of the laws and cuſtoms relating to parliament, conſidered as one aggregate body. We will next proceed to

IV. THE laws and cuſtoms relating to the houſe of lords in particular. Theſe, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of theſe commentaries, will take up but little of our time.

ONE very antient privilege is that declared by the charter of the foreſt[f], confirmed in parliament 9 Hen. III; *viz.* that every lord ſpiritual or temporal ſummoned to parliament, and paſſing through the king's foreſts, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the foreſter if he be preſent, or on blowing a horn if he be abſent: that he may not ſeem to take the king's veniſon by ſtealth.

IN the next place they have a right to be attended, and [168] conſtantly are, by the judges of the court of king's bench and common pleas, and ſuch of the barons of the exchequer as are of the degree of the coif, or have been made ſerjeants at law; as likewiſe by the king's learned counſel, being ſerjeants, and by the maſters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The ſecretaries of ſtate, with the attorney and

[d] Com. Journ. 20 Apr. 1762.
[e] particularly 17 Geo. II. c. 6.
[f] c. 11.

ſolicitor general, were alſo uſed to attend the houſe of peers, and have to this day, (together with the judges, &c.) their regular writs of ſummons iſſued out at the beginning of every parliament [g], *ad tractandum et conſilium impendendum*, though not *ad conſentiendum*; but, whenever of late years they have been members of the houſe of commons [h], their attendance here hath fallen into diſuſe (23).

ANOTHER privilege is, that every peer, by licence obtained from the king (24), may make another lord of parliament

[g] Stat. 31 Hen. VIII. c. 10. Smith's commonw. b. 2. c. 3. Moor. 551. 4 Inſt. 4. Hale of Parl. 140.

[h] See Com. Journ. 11 Apr. 1614. 8 Feb. 1620. 10 Feb. 1625. 4 Inſt. 48.

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(23) On account of this attendance there are ſeveral reſolutions before the reſtoration, declaring the attorney general incapable of ſitting among the commons. Sir Heneage Finch, member for the univerſity of Oxford, afterwards lord Nottingham and chancellor, was the firſt attorney general who enjoyed that privilege. *Sim.* 28.

(24) This licence has long ceaſed in Ireland; but the proxies in the Engliſh houſe of lords are ſtill entered in Latin *ex licentiâ regis*: this created a doubt in Nov. 1788, whether the proxies in that parliament were legal on account of the king's illneſs? (1 *Ld. Mountm.* 342.). But this I conceive is now ſo much a mere form, that the licence may be preſumed. Proxies cannot be uſed in a committee. *Ib.* 106. A proxy cannot ſign a proteſt in England, but he can in Ireland. (2 *Ib.* 191.)

The order that no lord ſhould have more than two proxies was made 2 Car. I. becauſe the duke of Buckingham had no leſs than fourteen. (1 *Ruſhw.* 269.)

A ſimilar order was made in Ireland during lord Strafford's lieutenancy to correct a like abuſe.

There is an inſtance in Wight, 50, where a proxy is called *litera attornatûs ad parliamentum*, which it is in effect. The peer who has the proxy is always called in Latin *procurator*. If a peer, after appointing a proxy, appears perſonally in parliament, his proxy is revoked and annulled. (4 *Inſt.* 13.) By the orders of the houſe, no proxy ſhall vote upon a queſtion of guilty or not guilty; and a ſpiritual lord ſhall only be a proxy for a ſpiritual lord, and a temporal lord for a temporal. Two or more peers may be proxy to one

his proxy, to vote for him in his abſence [i]. A privilege, which a member of the other houſe can by no means have, as he is himſelf but a proxy for a multitude of other people [k].

EACH peer has alſo a right, by leave of the houſe, when a vote paſſes contrary to his ſentiments, to enter his diſſent on the journals of the houſe, with the reaſons for ſuch diſſent; which is uſually ſtiled his proteſt (25).

ALL bills likewiſe, that may in their conſequences any way affect the right of the peerage, are by the cuſtom of parliament to have their firſt riſe and beginning in the houſe of peers, and to ſuffer no changes or amendments in the houſe of commons.

THERE is alſo one ſtatute peculiarly relative to the houſe of lords; 6 Ann. c. 23. which regulates the election of the ſixteen repreſentative peers of North Britain, in conſequence [169] of the twenty-ſecond and twenty-third articles of the union: and for that purpoſe preſcribes the oaths, &c. to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unuſual manner; and expreſsly provides, that no other matter ſhall be treated of in that aſſembly, ſave only the election, on pain of incurring a *praemunire*.

V. THE peculiar laws and cuſtoms of the houſe of commons relate principally to the raiſing of taxes, and the elections of members to ſerve in parliament.

FIRST, with regard to taxes: it is the antient indiſputable privilege and right of the houſe of commons, that all grants of ſubſidies or parliamentary aids do begin in their houſe, and

[i] Seld. baronage. p. 1. c. 1. [k] 4 Inſt. 12.

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one abſent peer; but lord Coke is of opinion (4 *Inſt.* 12.) that they cannot vote unleſs they all concur. 1 *Woodd.* 41.

(25) Lord Clarendon relates, that the firſt inſtances of proteſts with reaſons in England were in 1641, before which time they uſually only ſet down their names as diſſentient to a vote; the firſt regular proteſt in Ireland was in 1662. (1 *Ld. Mountm.* 402.)

are firſt beſtowed by them[l]; although their grants are not effectual to all intents and purpoſes, until they have the aſſent of the other two branches of the legiſlature. The general reaſon, given for this excluſive privilege of the houſe of commons, is, that the ſupplies are raiſed upon the body of the people, and therefore it is proper that they alone ſhould have the right of taxing themſelves. This reaſon would be unanſwerable, if the commons taxed none but themſelves: but it is notorious that a very large ſhare of property is in the poſſeſſion of the houſe of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *ſole* perſons taxed, this cannot be the reaſon of their having the *ſole* right of raiſing and modelling the ſupply. The true reaſon, ariſing from the ſpirit of our conſtitution, ſeems to be this. The lords being a permanent hereditary body, created at pleaſure by the king, are ſuppoſed more liable to be influenced by the crown, and when once influenced to continue ſo, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous, to give the lords any power of framing new taxes for the ſubject; it is ſufficient that they have a power of rejecting, if they think the commons too laviſh or improvident in their grants. But ſo reaſonably jealous are the commons of this valuable privilege, that herein they will not ſuffer the other houſe to exert any power but that of rejecting; they will not permit the leaſt alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raiſed upon the ſubject, for any purpoſe or in any ſhape whatſoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular diſtrict, as by turnpikes, pariſh rates, and the like (26). Yet ſir Matthew Hale[m] mentions one

[170]

[l] 4 Inſt. 29. [m] on parliaments. 65, 66.

(26) This rule is now extended to all bills for canals, paving, proviſion for the poor, and to every bill in which tolls, rates, or duties

caſe, founded on the practice of parliament in the reign of Henry VI [n], wherein he thinks the lords may alter a money bill: and that is, if the commons grant a tax, as that of tonnage and poundage, for *four years*; and the lords alter it to a leſs time, as for *two* years; here, he ſays, the bill need not be ſent back to the commons for their concurrence, but may receive the royal aſſent without farther ceremony; for the alteration of the lords is conſiſtent with the grant of the commons. But ſuch an experiment will hardly be repeated by the lords, under the preſent improved idea of the privilege of the houſe of commons, and, in any caſe where a money bill is remanded to the commons, all amendments in the mode of taxation are ſure to be rejected.

NEXT, with regard to the elections of knights, citizens, and burgeſſes; we may obſerve, that herein conſiſts the exerciſe of the democratical part of our conſtitution: for in a democracy there can be no exerciſe of ſovereignty but by ſuffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmoſt importance to regulate by whom, and in what manner, the ſuffrages are to be given. And the Athenians were ſo juſtly jealous of this prerogative, that a ſtranger, who interfered in the aſſemblies of the people, was puniſhed by their laws with death: becauſe ſuch a man was eſteemed guilty of high treaſon, by

[n] Year book, 33 Hen. VI. 17. But ſee the anſwer to this caſe by ſir Heneage Finch. Com. Journ. 22 Apr. 1671.

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duties are ordered to be collected; and alſo to all bills in which pecuniary penalties and fines are impoſed for offences. (3 *Hatſ.* 110.) But it ſhould ſeem it is carried beyond its original ſpirit and intent, when the money raiſed is not granted to the crown.

Upon the application of this rule, there have been many warm conteſts between the lords and commons, in which the latter ſeem always to have prevailed. See many conferences collected by Mr. Hatſel, in his Appendix to the 3d vol.

In Appendix D, the conference of 20 and 22 April 1671, the general queſtion is debated with infinite ability on both ſides, but particularly on the part of the commons in an argument drawn up by ſir Heneage Finch, then attorney general.

uſurping thoſe rights of ſovereignty, to which he had no title. In England, where the people do not debate in a collective body but by repreſentation, the exerciſe of this ſovereignty conſiſts in the choice of repreſentatives. The laws have therefore very ſtrictly guarded againſt uſurpation or abuſe of this power, by many ſalutary proviſions, which may be reduced to theſe three points, 1. The qualification of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

1. As to the qualifications of the electors. The true reaſon of requiring any qualification, with regard to property, in voters, is to exclude ſuch perſons as are in ſo mean a ſituation that they are eſteemed to have no will of their own. If theſe perſons had votes, they would be tempted to diſpoſe of them under ſome undue influence or other. This would give a great, an artful, or a wealthy man, a larger ſhare in elections than is conſiſtent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, ſhould have a vote in electing thoſe delegates, to whoſe charge is committed the diſpoſal of his property, his liberty, and his life. But, ſince that can hardly be expected in perſons of indigent fortunes, or ſuch as are under the immediate dominion of others, all popular ſtates have been obliged to eſtabliſh certain qualifications; whereby ſome, who are ſuſpected to have no will of their own, are excluded from voting, in order to ſet other individuals, whoſe wills may be ſuppoſed independent, more thoroughly upon a level with each other.

AND this conſtitution of ſuffrages is framed upon a wiſer principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, inſtituted by Servius Tullius, it was principally property, and not numbers, that turned the ſcale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws paſſed by the former method had uſually

uſually too great a tendency to aggrandize the patricians or rich nobles; and thoſe by the latter had too much of a levelling principle. Our conſtitution ſteers between the two extremes. Only ſuch are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, who is not entitled to a vote in ſome place or other in the kingdom. Nor is comparative wealth, or property, entirely diſregarded in elections; for though the richeſt man has only one vote at one place, yet, if his property be at all diffuſed, he has probably a right to vote at more places than one, and therefore has many repreſentatives. This is the ſpirit of our conſtitution: not that I aſſert it is in fact quite ſo perfect [n] as I have here endeavoured to deſcribe it; for, if any alteration might be wiſhed or ſuggeſted in the preſent frame of parliaments, it ſhould be in favour of a more complete repreſentation of the people.

BUT to return to our qualifications; and firſt thoſe of electors for knights of the ſhire. 1. By ſtatute 8 Hen. VI. c. 7. and 10 Hen. VI. c. 2. (amended by (27) 14 Geo. III. c. 58.) the knights of the ſhire ſhall be choſen of people whereof every man ſhall have freehold to the value of forty ſhillings by the year within the county; which (by ſubſequent ſtatutes) is to be clear of all charges and deductions, except parliamentary and parochial taxes (28). The knights of ſhires are the repre-

[n] The candid and intelligent reader will apply this obſervation to many other parts of the work before him, wherein the conſtitution of our laws and government are repreſented as nearly approaching to perfection; without deſcending to the invidious taſk of pointing out ſuch deviations and corruptions, as length of time and a looſe ſtate of national morals have too great a tendency to produce. The incurvations of practice are then the moſt notorious when compared with the rectitude of the rule; and to elucidate the clearneſs of the ſpring, conveys the ſtrongeſt ſatire on thoſe who have polluted or diſturbed it.

(27) The 14 Geo. III. c. 58. made the reſidence of the electors and the elected in their reſpective counties, cities, and boroughs no longer neceſſary. It had been required from both by a ſtatute paſſed in the 1 Hen. V.

(28) The voter's evidence of the value muſt be received at the poll; but it is not concluſive, and may be contradicted by other evi-

ſentatives of the landholders, or landed intereſt of the kingdom: their electors muſt therefore have eſtates in lands or tenements, within the county repreſented: theſe eſtates muſt be freehold, that is, for term of life at leaſt; becauſe beneficial leaſes for long terms of years were not in uſe at the making of theſe ſtatutes, and copyholders were then little better than villeins, abſolutely dependent upon their lords: this freehold muſt be of forty ſhillings annual value; becauſe that
[173] ſum would then, with proper induſtry, furniſh all the neceſſaries of life, and render the freeholder, if he pleaſed, an independent man. For biſhop Fleetwood, in his *chronicon preciosum*, written at the beginning of the preſent century, has fully proved forty ſhillings in the reign of Henry VI to have been equal to twelve pounds *per annum* in the reign of queen Anne; and, as the value of money is very conſiderably lowered ſince the biſhop wrote, I think we may fairly conclude, from this and other circumſtances, that what was equivalent to twelve pounds in his days is equivalent to twenty at preſent. The other leſs important qualifications of the electors for counties in England and Wales may be collected from the ſtatutes cited in the margin[o]; which direct, 2. That no perſon under twenty-

[o] 7 & 8 W. III. c. 25. 10 Ann. c. 23. 2 Geo. II. c. 21. 18 Geo. II. c. 18. 31 Geo. II. c. 14. 3 Geo. III. c. 24.

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dence, upon a ſcrutiny, or before a committee. The 7 & 8 W. III. c. 25. expreſsly declares, that public taxes are not to be deemed charges payable out of the eſtate; and therefore one would think that the plain and obvious conſtruction would be, that wherever a freeholder has an eſtate, which would yield him 40*s.* before theſe taxes are paid, or for which he would receive a rent of 40*s.* if he paid the taxes himſelf, he would have a right to vote; yet a committee has decided that when a tenant paid a rent leſs than 40*s.* but paid parochial taxes, which added to the rent amounted to more than 40*s.* the landlord had no right to vote. A ſtrange deciſion! 2 *Lud.* 475.

Two committees have held that the intereſt of a mortgage is a charge, which if it reduces the value under 40*s.* takes away the vote, though there is an intermediate deciſion of a committee, in which the contrary was held. *Ib.* 467.

one

one years of age ſhall be capable of voting for any member. This extends to all ſorts of members, as well for boroughs as counties; as does alſo the next, *viz.* 3. That no perſon convicted of perjury, or ſubornation of perjury, ſhall be capable of voting in any election. 4. That no perſon ſhall vote in right of any freehold, granted to him fraudulently to qualify him to vote. Fraudulent grants are ſuch as contain an agreement to reconvey, or to defeat the eſtate granted; which agreements are made void, and the eſtate is abſolutely veſted in the perſon to whom it is ſo granted (29). And, to guard the better againſt ſuch frauds, it is farther provided, 5. That every voter ſhall have been in the actual poſſeſſion, or receipt of the profits, of his freehold to his own uſe for twelve calendar months before; except it came to him by deſcent, marriage, marriage-ſettlement, will, or promotion to a benefice or office. 6. That no perſon ſhall vote in reſpect of an annuity or rent-charge, unleſs regiſtered with the clerk of the peace twelve calendar months before (30). 7. That in mortgaged or truſt eſtates, the perſon in poſſeſſion, under the above-mentioned reſtrictions, ſhall have the vote. 8. That only one perſon ſhall be admitted to vote for any one houſe or tenement, to prevent the ſplitting of freeholds (31). 9. That no eſtate

(29) And every perſon, who ſhall prepare or execute ſuch conveyance, or who ſhall give his vote under it, ſhall forfeit 40*l.* 10 *Ann. c.* 23. *ſ.* 1.

(30) It muſt be an annuity or rent-charge iſſuing out of a freehold eſtate; and if it accrues or devolves by operation of law within a year of the election, a certificate of it muſt be entered with the clerk of the peace before the firſt day of the election. 3 *Geo. III. c.* 24. *Heyw.* 145.

(31) This is true only when a freehold eſtate is ſplit and divided by the grantor in order to multiply votes and for election purpoſes. It would be highly unreaſonable and abſurd to ſuppoſe (though it has been ſo contended) that it extends to every caſe, where a perſon fairly and without any particular view to an election purchaſes a part of a greater eſtate. It is part of the freeholder's oath that the eſtate has not been granted to him fraudulently on purpoſe to qualify him to give his vote. The one vote I preſume was intended for the part retained by the grantor, for if the whole had been

ſhall qualify a voter, unleſs the eſtate has been aſſeſſed to ſome land tax aid, at leaſt twelve months before the election (32).

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been granted out thus fraudulently, no vote at all could have been given for it. See this ſubject treated fully in Mr. Heywood's Law of Elect. 99. It cannot, I ſhould think, be conſidered a fraudulent grant under any ſtatute, if a perſon ſhould purchaſe an eſtate merely for the ſake of the vote, if he buys it abſolutely, and without any reſervation, or ſecret agreement between the grantor and himſelf.

But it never has been ſuppoſed that this ſtatute extends to caſes which ariſe from operation of law, as deviſes, deſcents, &c. as if an eſtate ſhould deſcend to any number of females, the huſband of each would have a right to vote, if his intereſt amounted to 40*s.* a year.

A huſband may vote for his wife's right of dower without an actual aſſignment of it by metes and bounds. 20 *Geo. III. c.* 17. *ſ.* 12.

But it has been determined that a member of a corporation aggregate cannot vote in right of an eſtate belonging to the corporation. *Heyw.* 71.

Two or more votes may be given ſucceſſively for the ſame eſtate or intereſt at the ſame election; as where a freeholder votes and dies, his heir or deviſee may afterwards vote at the ſame election. And it ſeems to be generally true, that where no length of poſſeſſion is required by any act of parliament, the elector may be admitted to vote, though his right accrued ſince the commencement of the election. 1 *Doug.* 272. 2 *Lud.* 427.

(32) This is altered by 20 Geo. 3. c. 17. The eſtate ſhall be aſſeſſed to the land-tax ſix months before the election, either in the name of the voter or his tenant; but if he has acquired it by marriage, deſcent, or other operation of law, in that caſe it muſt have been aſſeſſed to the land-tax within two years before the election, either in the name of the predeceſſor, or perſon through whom the voter derives his title, or in the name of the tenant of ſuch perſon.

And to remove a doubt which had ariſen upon the conſtruction of 20 Geo. III. c. 17. the 30 Geo. III. c. 35. expreſsly declares, that it is ſufficient if either the name of the proprietor, or of the occupier, be ſpecified in the aſſeſſment.

This requiſite of aſſeſſment was intended to prevent fraud and confuſion, by having a ready proof of the exiſtence of the eſtate of the voter, and ſome meaſure of it's value; but it is itſelf perhaps a greater evil than it was intended to remove; for an omiſſion or irregularity in the aſſeſſment operates as a diſfranchiſement.

Every

10. That no tenant by copy of court roll ſhall be permitted to vote as a freeholder. Thus much for the electors in counties (33).

As for the electors of citizens and burgeſſes, theſe are ſuppoſed to be the mercantile part or trading intereſt of this kingdom. But as trade is of a fluctuating nature, and ſeldom long fixed in a place, it was formerly left to the crown to ſummon, *pro re nata*, the moſt flouriſhing towns to ſend repreſentatives to parliament. So that as towns increaſed in trade, and grew populous, they were admitted to a ſhare in the legiſlature. But the misfortune is, that the deſerted boroughs continued to be ſummoned, as well as thoſe to whom their trade and inhabitants were transferred; except a few which petitioned to be eaſed of the expence, then uſual, of maintaining their members: four ſhillings a day being allowed for a knight of the ſhire, and two ſhillings for a citizen or burgeſs: which was the rate of wages eſtabliſhed in the reign of Edward III.[p] (34) Hence the members for boroughs now

[p] 4 Inſt. 16.

Every freeholder, who wiſhes to preſerve the important privilege of voting, muſt carefully examine every year the aſſeſſment, when it is ſtuck upon the church door, to ſee that he is duly aſſeſſed; and if he is not, he may appeal to the commiſſioners, and he may any time afterwards apply to the clerk of the peace, and upon payment of 1 s. may examine the duplicate returned to the ſeſſions; but it ſeems that he is then too late to correct an error, unleſs he has previouſly appealed to the commiſſioners; but from the judgment of the commiſſioners an appeal lies to the next quarter ſeſſions.

(33) By 22 Geo. III. c. 41. no perſon employed in managing or collecting the duties of exciſe, cuſtoms, ſtamps, ſalt, windows, or houſes, or the revenue of the poſt-office, ſhall vote at any election, and if ſuch perſon preſumes to vote, he ſhall forfeit 100 *l.* This act does not extend to freehold offices granted by letters patent.

(34) Lord Coke, in the page referred to by the learned Judge, ſays, that this rate of wages hath been time out of mind, and that it is expreſſed in many records; and for example, refers to one in the 46 Ed. III. where this allowance is made to one of the knights for the county of Middleſex. But Mr. Prynne's fourth Regiſter of Parliamentary Writs, is confined almoſt entirely to the inveſtigation

bear above a quadruple proportion to thoſe for counties, and the number of parliament men is increaſed ſince Forteſcue's

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inveſtigation of this ſubject, and contains a very particular chronological hiſtory of the writ *de expenſis militum, civium, et burgenſium*, which was framed to enforce the payment of theſe wages. Mr. Prynne is of opinion that theſe wages had no other origin than that principle of natural equity and juſtice *qui ſentit commodum, debet ſentire et onus.* (p. 5.)

I ſhall endeavour to prove, upon a future occaſion, that repreſentation at the firſt was nothing more than the attendance of a part of a number, who were individually bound to attend, and where the attendance of the reſt was diſpenſed with; and as all were under the ſame obligation to render this ſervice, and it was left to themſelves to determine which of them ſhould undertake it, it became equitable that all ſhould contribute to the expence and inconvenience incurred. And what Mr. Prynne informs us is remarkable: "that the firſt writs of this kind extant in our "records are coeval with our king's firſt writs of ſummons to "elect and ſend knights, citizens, and burgeſſes, to parliament, "both of them being firſt invented, iſſued, and recorded toge-"ther in 49 H. III. before which there are no memorials nor "evidences of either of thoſe writs in our hiſtorians or records." (p. 2.) The firſt writs direct the ſheriff to levy from the community, *i. e.*, the electors of the county, and to pay the knights, *rationabiles expenſas ſuas in veniendo ad dictum parliamentum, ibidem morando, et exinde ad propria redeunda.* And when the writs of ſummons were renewed in the 23d of Ed. I. theſe writs iſſued again in the ſame form at the end of the parliament, and were continued in the ſame manner till the 16 Ed. II. when Mr. Prynne finds the "*memorable writs*," which firſt reduced the expences of the repreſentatives to a certain ſum by the day, viz. 4*s.* a day for every knight, and 2*s.* for every citizen and burgeſs; and they ſpecified alſo the number of days for which this allowance was to be made, being more or leſs according to the diſtance between the place of meeting in parliament and the member's reſidence. When this ſum was firſt aſcertained in the writ, the parliament was held at York, and therefore the members for Yorkſhire were only allowed their wages for the number of days the parliament actually ſat, being ſuppoſed to incur no expence in returning to their reſpective homes; but at the ſame time, the members for the diſtant counties had a proportionate allowance in addition. Though from this

time, in the reign of Henry the ſixth, from 300 to upwards of 500, excluſive of thoſe for Scotland. The univerſities were in

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this time the number of days and a certain ſum are ſpecifically expreſſed in the writ, yet Mr. Prynne finds a few inſtances after this, where the allowance is a leſs ſum; and in one, where one of the county members had but 3*s.* a day becauſe he was not, in fact, a knight. But with thoſe few exceptions, the ſum and form continued with little or no variation. Mr. Prynne conjectures, with great appearance of reaſon, that the members at that time enjoyed the privilege of parliament only for the number of days for which they were allowed wages, that being conſidered a ſufficient time for their return to their reſpective dwellings. (p. 68.) But this allowance, from its nature and origin, did not preclude any other ſpecific engagement or contract between the member and his conſtituents; and the editor of Glanville's Reports has given in the preface, p. 23, the copy of a curious agreement between John Strange the member for Dunwich and his electors, in the 3 Ed. IV. 1463, in which the member covenants, "whether the "parliament hold long time or ſhort, or whether it fortune to be "prorogued, that he will take for his wages only a cade and half "a barrel of herrings, to be delivered by Chriſtmas."

In Scotland the repreſentation of the ſhires was introduced or confirmed by the authority of the legiſlature, in the ſeventh parliament of Ja. I. *anno* 1427, and there it is at the ſame time expreſsly provided, that "the commiſſares ſall have coſtage of them "of ilk ſchire, that awe compeirance in parliament." *Murray's Stat.*

It is ſaid that Andrew Marvell, who was member for Hull in the parliament after the reſtoration, was the laſt perſon in this country that received wages from his conſtituents. Two ſhillings a day, the allowance to a burgeſs, was ſo conſiderable a ſum in ancient times, that there are many inſtances where boroughs petitioned to be excuſed from ſending members to parliament, repreſenting that they were engaged in building bridges or other public works, and therefore unable to bear ſuch an extraordinary expence. (*Pryn. on* 4 *Inſt.* 32.) And it is ſomewhat remarkable, that from the 33 Ed. III. and uniformly through the five ſucceeding reigns, the ſheriff of Lancaſhire returned, *non ſunt aliquæ civitates ſeu burgi infra comitatum Lancaſtriæ, de quibus aliqui cives vel burgenſes ad dictum parliamentum venire debent ſeu ſolent, nec poſſunt propter eorum debilitatem & paupertatem.* But from theſe exemptions in ancient times, and the new creations by the king's charter,

general not empowered to ſend burgeſſes to parliament; though once, in 28 Edw. I. when a parliament was ſummoned to conſider of the king's right to Scotland, there were iſſued writs which required the univerſity of Oxford to ſend up four or five, and that of Cambridge two or three, of their moſt diſcreet and learned lawyers for that purpoſe [q]. But it was king James the

[q] Prynne parl. writs. 1. 345.

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ter, which commenced in the reign of Ed. IV. (who in the 17th year of his reign granted to the borough of Wenlock the right of ſending one burgeſs to parliament,) (*Sim.* 97.) the number of the members of the houſe of commons perpetually varied till the 29 Car. II. who in that year granted, by his charter, to Newark, the privilege of ſending repreſentatives to parliament, which was the laſt time that this prerogative of the crown was exerciſed. (1 *Doug. El.* 69.) Since the beginning of the reign of Hen. VIII. the number of the repreſentatives of the commons is nearly doubled; for in his firſt parliament the houſe conſiſted only of 298 members: it does not appear that any place has loſt its right of ſending repreſentatives ſince that time; and 260 have ſince been added by act of parliament, or by the king's charter either creating new or reviving old boroughs. The legiſlature added 27 for Wales by 27 Hen. VIII. c. 26.; 4 for the county and city of Cheſter by 34 Hen. VIII. c. 13.; 4 for the county and city of Durham by 25 Car. II. c. 9.; and 45 for Scotland by the act of union; in all 80; and 180 have been added by charter: Hen. VIII. created or reſtored by charter 4. See *Pref.* to *Glanv. Rep.*

Ed. VI. - - -	48
Mary - - -	21
Elizabeth - - -	60
Ja. I. - - -	27
Ch. I. - - -	18
Ch. II. - - -	2
	180
Parliament has created -	80
In the firſt parliament of Hen. VIII.	298
In all	558 the preſent number.

In the firſt parliament of Ja. I. the members of the upper houſe were 78, of the lower 470. 5 *Parl. Hiſt.* 11.

firſt who indulged them with the permanent privilege to ſend conſtantly two of their own body; to ſerve for thoſe ſtudents who, though uſeful members of the community, were neither concerned in the landed nor the trading intereſt; and to protect in the legiſlature the rights of the republic of letters. The right of election in boroughs is various, depending entirely on the ſeveral charters, cuſtoms, and conſtitutions of the reſpective places, which has occaſioned infinite diſputes; though now by ſtatute 2 Geo. II. c. 24. the right of voting for the [175] future ſhall be allowed according to the laſt determination of the houſe of commons concerning it (35). And by ſtatute

(35) That ſtatute was merely retroſpective; or only made the laſt determination of the right prior to the ſtatute concluſive, without having any influence over deciſions ſubſequent to the 2 Geo. II. And this proviſion was omitted in Mr. Grenville's excellent act, ſo that the ſame queſtion, reſpecting the right of election in ſome places, was tried over again every new parliament: but to ſupply this defect, it was enacted by the 28 Geo. III. c. 52. that whenever a committee ſhall be of opinion that the merits of a petition depend upon a queſtion reſpecting the right of election, or the appointment of the returning officer, they ſhall require the counſel of the reſpective parties, to deliver a ſtatement of the right for which they contend, and the committee ſhall then report to the houſe thoſe ſtatements with their judgment thereupon; and if no perſon petition within a twelvemonth, or within fourteen days after the commencement of the next ſeſſion, to oppoſe ſuch judgment, it is final and concluſive for ever. But if ſuch a petition be preſented, then, before the day appointed for the conſideration of it, any other perſon, upon his petition, may be admitted to defend the judgment; and a ſecond committee ſhall be appointed exactly in the ſame manner as the firſt, and the deciſion of that committee puts an end to all future litigation upon the point in queſtion.

The 28 Geo. III. c. 52. requires that the ſpace of 40 days ſhall intervene between the day of preſenting the petition and the day appointed for the conſideration of it; and this had been conſtrued to extend to petitions which are renewed in every ſubſequent ſeſſions: the 34 Geo. III. c. 83. therefore provides that every ſuch renewed petition ſhall be preſented within fourteen days after the

3 Geo. III. c. 15. no freeman of any city or borough (other than ſuch as claim by birth, marriage, or ſervitude) ſhall be entitled to vote therein, unleſs he hath been admitted to his freedom twelve calendar months before (36).

2. NEXT, as to the qualifications of perſons to be *elected* members of the houſe of commons. Some of theſe depend upon the law and cuſtom of parliament, declared by the houſe of commons[r]; others upon certain ſtatutes. And from theſe it appears, 1. That they muſt not be aliens born[s], or minors[t]. 2. That they muſt not be any of the twelve judges[u], becauſe they ſit in the lords' houſe; nor of the clergy[w], for they ſit in

[r] 4 Inſt. 47, 48.
[s] See pag. 162.
[t] *ibid.*
[u] Com. Journ. 9 Nov. 1605.
[w] Com. Journ. 13 Oct. 1553. 8 Feb. 1620. 17 Jan. 1661.

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the commencement of the ſubſequent ſeſſions, but that the hearing of it may be appointed on any day beyond fourteen days after it is ſo preſented.

(36) This is called the Durham act, and it was occaſioned by the corporation of Durham having, upon the eve of an election, in order to ſerve one of the candidates, admitted 215 honorary freemen. Some corporations have the power of admitting honorary freemen, viz. perſons who, without any previous claim or pretenſion, are admitted to all the franchiſes of the corporation. The Durham act is confined to perſons of that deſcription ſolely. It has frequently been contended, that if honorary freemen are created for the *occaſion*, that is, merely for an election purpoſe, it is a fraud upon the rights of election; and that by the common law, as in other caſes of fraud, the admiſſion and all the conſequences would be null and void; that within the year, by the ſtatute, fraud was preſumed; but that after that time, the ſtatute left the neceſſity of proving it upon thoſe who imputed it. But in the Bedford caſe, (2 *Doug.* 91.) the committee were clearly of opinion, that the objection of occaſionality did not lie againſt freemen made above a year before the election.

No length of poſſeſſion is required from voters in burgage-tenure boroughs. There are about twenty-nine burgage-tenure boroughs in England. (1 *Doug.* 224.) In theſe the right of voting is annexed to ſome tenement, houſe, or ſpot of ground, upon which a houſe in ancient times has ſtood. Any number of theſe

the convocation (37); nor perſons attainted of treaſon or felony [x], for they are unfit to ſit any where. 3. That ſheriffs of

[x] Com Journ. 21 Jan. 1580. 4 Inſt. 47.

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burgage-tenure eſtates may be purchaſed by one perſon, which, at any time before a conteſted election, may be conveyed to ſo many of his friends, who would each in conſequence have a right to vote.

By the 26 Geo. III. c. 100. it is enacted, that in boroughs, where the houſeholders or inhabitants of any deſcription claim to elect, no perſon ſhall have a right to vote as ſuch inhabitant, unleſs he has actually been reſident in the borough ſix months previous to the day on which he tenders his vote.

(37) It was decided by a committee of the houſe of commons in the caſe of Newport in 1785, that a gentleman who had been regularly admitted to deacon's orders, was capable of being a member of that houſe. (See 2 *Lud.* 269.) Many of the arguments in that caſe may be urged with equal force for the admiſſion and excluſion of a perſon in prieſt's orders. The chief authorities for the excluſion of the clergy are the entries in the commons' journals, referred to by the learned Judge in the notes; in the two firſt of which this reaſon is aſſigned, viz. that the perſons returned being clerks, they have or might have a voice in the houſe of convocation. And lord Coke alſo ſays, (4 *Inſt.* 47.) that "none of the clergy, though "they be of the loweſt order, are eligible, becauſe they are of an-"other body, viz. of the convocation;" and he refers to the firſt entry in the commons' journals. Beſides theſe authorities, there are canons of the church which prohibit the clergy from *voluntarily relinquiſhing the office of a deacon or miniſter*, and from uſing themſelves in the courſe of their lives as laymen, and from *exerciſing ſecular juriſdictions*, (1 *Gibſ. Cod.* 180. 184.) Mr. Wooddeſon has obſerved, that the argument from the convocation ought not to be urged againſt the unbeneficed clergy, as none but the beneficed clergy voted for the proctors or repreſentatives in convocation. (1 *Woodd.* 47.)

This reaſon for diſqualifying the inferior clergy from ſitting in the houſe of commons, would extend to the excluſion of the biſhops from the houſe of lords. It happens not unfrequently that a peerage deſcends to a clergyman in prieſt's orders, and it has never been ſuppoſed that this ſacred character, although he ſhould retain a benefice, would diſable him from taking his ſeat in the upper houſe. And this argument is ſtronger when we conſider

counties, and mayors and bailiffs of boroughs, are not eligible in their reſpective juriſdictions, as being returning officers[7].

7 Bro. *Abr. t. parliament.* 7. Com. 22 Mar. 1620. 2. 4. 15 Jun. 17 Nov. Journ. 25 June, 1604. 14 Apr. 1614. 1685. Hal. of parl. 114.

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that, in the origin of our parliaments, the qualifications of the members of the two houſes were preciſely the ſame, viz. land held *in capite* of the king. Until the reformation, 29 of the regular clergy, abbots and priors, who were dead in law to moſt other purpoſes, had ſeats in the houſe of lords, in conſequence of the lands, which they held of the crown. In Scotland the barons and commiſſioners of ſhires ſat together and conſtituted one eſtate. It would have been unaccountable if holy orders by the common law had excluded one part of that eſtate from parliament and not the other; but both in Scotland and Ireland the clergy were declared ineligible by ſtatute; which affords an inference that, without the authority of an act of parliament, they would of common right have participated this privilege with other ſubjects. (*Wight*, 293. 1 *Ld. Mountm.* 50.) The argument drawn from the ſitting in the convocation has been called a *new pretence* in the time of queen Mary, in order to expel ſome proteſtant clergy from the houſe. (*Hody, Conv.* 429.) There is a memorable inſtance in the time of Richard II. of a clergyman who ſignalized himſelf in the houſe of commons; he is called ſir Thomas Haxey, clerk; he brought in a bill, which paſſed the commons, to leſſen the expences of the king, and to remove biſhops and ladies from the court; for which the commons were obliged to make conceſſions, and to ſurrender the author of the bill to the king; and he was afterwards condemned by the parliament to die as a traitor, but his life was ſpared at the interceſſion of the biſhops becauſe he was a clergyman. (*Ro. Parl.* 20 *R.* 2. n° 16 & 23.) The boldneſs of his conduct proves that he had no ſuſpicion that his title to a ſeat in parliament could be queſtioned. With regard to the canons, they ſeem to have as little weight as the argument drawn from the convocation; for they prove nothing by proving too much; for theſe canons, if available, would alſo preclude the clergy from acting in the commiſſion of the peace, a ſecular juriſdiction which they have long exerciſed. If the clergy were eligible prior to, or independent of the canons, then the validity of them may be juſtly queſtioned, even of thoſe made antecedent to 25 Hen. VIII. (ſee ante, p. 83.) for perſons who were eligible might in all caſes, and may ſtill in ſome,

but that ſheriffs of one county are eligible to be knights of another[z](38). 4. That, in ſtrictneſs, all members ought to have

[z] 4 Inſt. 48. Whitelocke of parl. ch. 99, 100, 101.

be compelled to ſerve in parliament againſt their conſent (1 *Doug. El. Caſes*, 284.); and no ſet of men ought to be allowed to diſable themſelves and deprive their country of their ſervices by any laws of their own, which are not expreſsly confirmed by the authority of the legiſlature. The objection to a clergyman's eligibility does not ſeem to be much ſtronger even when he is beneficed; for, from the reſidence enforced by the ſpiritual judge, the 9th ch. of the *articuli cleri* 9 Ed. II. exempts and privileges thoſe who are engaged in the ſervice of the king and commonwealth; *nec debet dici tendere in prejudicium eccleſiaſticæ libertatis quod pro rege et republicâ neceſſarium invenitur*; which lord Coke declares is worthy to be written in letters of gold, (2 *Inſt.* 625.) An attendance in parliament is pre-eminently *pro rege et republicâ neceſſarium*. With regard to the reſidence required by the 21 Hen. VIII. c. 13. I conceive that important rights and franchiſes are not loſt or deſtroyed merely becauſe they become in ſome degree inconſiſtent with the proviſions of a new ſtatute, which is entirely ſilent reſpecting them; if that were the caſe, the beneficed clergy have alſo loſt their capacity to ſit in the convocation; for though the ſtatute makes exception in ſome caſes of abſence, as upon pilgrimages and the king's ſervice abroad, yet there is no exception for attendance upon the convocation. But even when the clergy were permitted to tax themſelves in convocation, that circumſtance was very inadequate to debar them from electing or being elected to parliament. Taxation is certainly an important branch of legiſlation; yet it is far from the whole concern of that power which ſuperintends and protects our lives, liberty, and property. When the clergy ceaſed to tax themſelves, the reaſon for their ſharing in the rights and privileges of repreſentation was ſtrengthened but not created. After the clergy granted the laſt ſubſidy in convocation in 1663, and were afterwards taxed in parliament, as if this alone had precluded them from a ſhare of parliamentary repreſentation, they tendered their votes in right of their glebes at county elections, which have ever ſince been received with tacit approbation. But the capacity to elect and to be elected being originally the ſame, when you take away an obſtruction from the one, you remove it alſo from the other, unleſs ſome expreſs law has ſuperinduced a farther impediment: but I apprehend that the reaſon that the

been inhabitants of the places for which they are choſen[a]: but this, having been long diſregarded, was at length entirely repealed by ſtatute 14 Geo. III. c. 58. 5. That no perſons concerned in the management of any duties or taxes created ſince 1692, except the commiſſioners of the treaſury[b], nor any of the officers following[c], (*viz.* commiſſioners of prizes, tranſports, ſick and wounded, wine licences, navy, and victualling; ſecretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar;

[a] Stat. 1 Hen. V. c. 1. 23 Hen. VI. c. 15.

[b] Stat. 5 & 6 W. & M. c. 7.

[c] Stat. 11 & 18 W. III. c. 2. 12 & 13 W. III. c. 10. 6 Ann. c. 7. 15 Geo. II. c. 22.

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clergy, having no other lands than their glebes, never voted nor were elected in ancient times, did not in any degree depend either upon taxation or the convocation; but that it was owing ſolely to the tenure of their glebe land, viz. frankalmoign, which exempted them from attendance on the courts of the king, lords, and ſheriffs (2 *Bl.* 101.); and even if they held other lands, holy orders exempted them by the common law from ſecular ſervices and temporal offices; and this was confirmed by magna charta and the ſtatute of Marlbridge. (2 *Inſt.* 3 & 121.) This was an exemption, and not an excluſion; but what are now important rights, were originally conſidered duties and burdens: it is not therefore ſtrange, that the clergy ſhould avail themſelves of this privilege till the diſuſer became regarded as an incapacity. Their glebe lands are, no doubt, freeholds under the 8 Hen. VI. c. 7.; and when they were admitted to vote for repreſentatives in right of theſe freeholds, it followed as a conſequence, that they were alſo eligible to repreſent, unleſs ſome better authority can be produced for their excluſion than merely diſuſe, or their having a voice in the convocation, where they no longer tax themſelves, or their being prohibited by canons, which in other inſtances are diſregarded, and which probably could never be thought to be obligatory upon the parliament.

(38) Two deciſions of committees are agreeable to what is advanced in the text. In the firſt it was determined, that the ſheriff of Berkſhire could not be elected for Abingdon, a borough within that county (1 *Doug.* 419.): in the ſecond, that the ſheriff of Hampſhire could be elected for the town of Southampton within that county, becauſe Southampton is a county of itſelf, and is as independent of Hampſhire as of any other county. 4 *Doug.* 87.

officers

officers of the exciſe and cuſtoms; clerks or deputies in the ſeveral offices of the treaſury, exchequer, navy, victualling, admiralty, pay of the army or navy, ſecretaries of ſtate, ſalt, ſtamps, appeals, wine licences, hackney coaches, hawkers and pedlars,) nor any perſons that hold any new office under the crown created ſince 1705[d], are capable of being elected or ſitting as members(39). 6. That no perſon having a penſion under the crown during pleaſure, or for any term of years, is capable of being elected or ſitting[e]. 7. That if any member accepts an office under the crown, except an officer in the army or navy accepting a new commiſſion, his ſeat is void; but ſuch member is capable of being re-elected[f]. 8. That all knights

[d] Stat. 6 Ann. c. 7.
[e] Stat. 6 Ann. c. 7. 1 Geo. c. 56.
[f] Stat. 6 Ann. c. 7.

(39) All the perſons enumerated above are utterly incapable of ſitting in the houſe of commons, whilſt they continue in their reſpective ſituations; and amongſt theſe are all perſons who accept from the crown any office created ſince 1705. But by the 26th ſection of the ſame act, 6 Ann. c. 7. if any member ſhall accept of any office of profit from the crown, his election or ſeat becomes void, but he may be re-elected. This means an office of profit, which was in exiſtence prior to 1705.

The office or truſt of a member of parliament cannot be reſigned, and every member is compellable to diſcharge the duties of it, unleſs he can ſhew ſuch a cauſe, as the houſe in it's diſcretion will think a ſufficient excuſe for his non-attendance upon a call of the houſe. The only way therefore of vacating a ſeat, is by accepting a ſituation, in conſequence of which the law declares his ſeat vacant. So where members wiſh to vacate their ſeats and retire from parliament, it is now uſual for the crown to grant them the office of the ſtewardſhip of the Chiltern Hundreds. Mr. Hatſell obſerves, that "the practice of accepting this nominal office, "which began, he believes, only about the year 1750, has been "now ſo long acquieſced in from it's convenience to all parties, "that it would be ridiculous to ſtate any doubt about the legality "of it's proceedings; otherwiſe, (he believes,) it would be found "very difficult, from the form of theſe appointments, to ſhew "that it is an office of profit under the crown." (2 *Hatſ.* 41.) But Mr. Hatſell himſelf raiſes a doubt, which I do not think he removes; for ſurely no uſage ſince 1750, or no uſage whatever, can countervail the clear and expreſs words of an act of parliament.

of the ſhire ſhall be actual knights, or ſuch notable eſquires and gentlemen as have eſtates ſufficient to be knights (40), and by no means of the degree of yeomen [g]. This is reduced to a ſtill greater certainty, by ordaining, 9. That every knight of a ſhire ſhall have a clear eſtate of freehold or copyhold (41) to the value of ſix hundred pounds *per annum*, and every citizen and burgeſs to the value of three hundred pounds: except the eldeſt ſons of peers, and of perſons qualified to be knights of ſhires, and except the members for the two univerſities [h]: which ſomewhat balances the aſcendant which the boroughs have gained over the counties, by obliging the trading intereſt to make choice of landed men: and of this qualification the member muſt make oath, and give in the particulars in writing, at the time of his taking his ſeat [i] (42). But, ſubject to theſe ſtanding reſtrictions and diſqualifications, every ſubject of the realm is eligible of common right: though there are inſtances, wherein perſons in particular circumſtances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the houſe of

g Stat. 23 Hen. VI. c. 15.
h Stat. 9 Ann. c. 5.
i Stat. 33 Geo. II. c. 20.

(40) This, by the ſtatute *de militibus* 1 Ed. II. was 20*l.* a year, and put in force againſt thoſe who had 40*l.* a year till 16 Car. I. c. 16. See p. 404.

(41) Or mortgage, if the mortgagee has been ſeven years in poſſeſſion.

(42) By 22 Geo. III. c. 45. no contractor with the officers of government, or with any other perſon for the ſervice of the public, ſhall be capable of being elected, or of ſitting in the houſe, as long as he holds any ſuch contract, or derives any benefit from it. But this does not extend to contracts with corporations, or with companies, which then conſiſted of ten partners, or to any perſon to whom the intereſt of ſuch a contract ſhall accrue by marriage or operation of law for the firſt twelve months. And if any perſon diſqualified by ſuch a contract ſhall ſit in the houſe, he ſhall forfeit 500*l.* for every day; and if any perſon who engages in a contract with government, admits any member of parliament to a ſhare of it, he ſhall forfeit 500*l.* to the proſecutor.

commons,

commons [j], or *for ever* by an act of the legiſlature [k]. But it was an unconſtitutional prohibition which was grounded on an ordinance of the houſe of *lords* [l], and inſerted in the *king*'s writs, for the parliament holden at Coventry, 6 Hen. IV, that no apprentice or other man of the law ſhould be elected [177] a knight of the ſhire therein [m]; in return for which, our law books and hiſtorians [n] have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and ſir Edward Coke obſerves with ſome ſpleen [o], that there was never a good law made thereat.

3. THE third point, regarding elections, is the method of proceeding therein. This is alſo regulated by the law of parliament, and the ſeveral ſtatutes referred to in the margin [p]; all which I ſhall blend together, and extract out of them a ſummary account of the method of proceeding to elections.

As ſoon as the parliament is ſummoned, the lord chancellor (or if a vacancy happens during the ſitting of parliament, the ſpeaker, by order of the houſe; and without ſuch order, if a vacancy happens by death, or the member's becoming a peer (44), in the time of a receſs for upwards of twenty days)

j See page 163.
k Stat. 7 Geo. I. c. 28.
l 4 Inſt. 10. 48. Pryn. Plea for lords. 379. 2 Whitelocke, 359. 368.
m Pryn. on 4 Inſt. 13.
n Walſingh. *A. D.* 1403.
o 4 Inſt. 48.
p 7 Hen. IV. c. 15. 8 Hen. VI. c. 7. 23 Hen. VI. c. 14. 1 W. & M. ſt. 1. c. 2. 2 W. & M. ſt. 1. c. 7. 5 & 6 W. & M. c. 20. 7 W. III. c. 4. 7 & 8 W. III. c. 7. and c 25. 10 & 11 W. III. c. 7. 12 & 13 W. III. c. 10. 6 Ann. c. 23. 9 Ann. c. 5. 10 Ann. c. 19. and c 33. 2 Geo. II. c. 24. 8 Geo. II. c. 30. 18 Geo. II. c. 18. 19 Geo. II. c. 28. 10 Geo. III. c. 16. 12 Geo. III. c. 42. 14 Geo. III. c. 15. 15 Geo. III. c. 36. 28 Geo. III. c. 52.

(44) With regard to a vacancy by death or a peerage during a receſs, the 24 Geo. III. ſ. 2, c. 26. which repeals the former ſtatutes upon this ſubject, provides, that if during any receſs any two members give notice to the ſpeaker by a certificate under their hands, that there is a vacancy by death, or that a writ of ſummons has iſſued under the great ſeal to call up any member to the houſe of lords, the ſpeaker ſhall forthwith give notice of it to be

ſends his warrant to the clerk of the crown in chancery; who thereupon iſſues out writs to the ſheriff of every county, for the election of all the members to ſerve for that county, and every city and borough therein. Within three days (45) after the receipt of this writ, the ſheriff is to ſend his precept, under his ſeal, to the proper returning officers of the cities and boroughs, commanding them to elect their members: and the ſaid returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the ſame [q]; and to return the perſons choſen, together with the precept, to the ſheriff.

BUT elections of knights of the ſhire muſt be proceeded to by the ſheriffs themſelves in perſon, at the next county court [178] that ſhall happen after the delivery of the writ. The county court is a court held every month or oftener by the ſheriff, intended to try little cauſes not exceeding the value of forty

[q] In the borough of New Shoreham in Suſſex, wherein certain freeholders of the county are entitled to vote by ſtatute 11 Geo. III. c. 55. the election muſt be within *twelve* days, with *eight* days notice of the ſame.

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inſerted in the Gazette; and at the end of fourteen days after ſuch inſertion, he ſhall iſſue his warrant to the clerk of the crown, commanding him to make out a new writ for the election of another member. But this ſhall not extend to any caſe where there is a petition depending concerning ſuch vacant ſeat, or where the writ for the election of the member ſo vacating had not been returned fifteen days before the end of the laſt ſitting of the houſe, or where the new writ cannot iſſue before the next meeting of the houſe for the diſpatch of buſineſs. And to prevent any impediment in the execution of this act by the ſpeaker's abſence from the kingdom, or by the vacancy of his ſeat, at the beginning of every parliament he ſhall appoint any number of members from three to ſeven inclusive, and ſhall publiſh the appointment in the Gazette. Theſe members, in the abſence of the ſpeaker, ſhall have the ſame authority as is given to him by this ſtatute. Theſe are the only caſes provided for by act of parliament; ſo for any other ſpecies of vacancy no writ can iſſue during a receſs.

(45) The officer of the cinque ports has ſix days by 10 and 11 W. III. c. 7.

ſhillings,

ſhillings, in what part of the county he pleaſes to appoint for that purpoſe: but for the election of knights of the ſhire it muſt be held at the moſt uſual place. If the county court falls upon the day of delivering the writ, or within ſix days after, the ſheriff may adjourn the court and election to ſome other convenient time, not longer than fixteen days, nor ſhorter than ten; but he cannot alter the place, without the conſent of all the candidates: and, in all ſuch caſes, ten days public notice muſt be given of the time and place of the election (46).

AND, as it is eſſential to the very being of parliament, that elections ſhould be abſolutely free, therefore all undue influences upon the electors are illegal and ſtrongly prohibited (47).

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(46) This is altered by 25 Geo. III. c. 84. which enacts, that in every county, the ſheriff having indorſed on the back of the writ the day on which he receives it, ſhall, within two days after the receipt thereof, cauſe proclamation to be made at the place where the enſuing election ought by law to be held, of a ſpecial county court to be there held, for the purpoſe of ſuch election only, on any day, Sunday excepted, not later from the day of making ſuch proclamation than the 16th day, nor ſooner than the 10th; and that he ſhall proceed in ſuch election at ſuch ſpecial county court in the ſame manner as if the ſaid election had been held at a county court, or at an adjourned county court, according to the former laws. And by the 33 Geo. III. c. 64. the proclamation muſt be made at the uſual place between the hours of eight o'clock in the morning and four in the afternoon, from the 25th of October to the 25th of March; and in the reſt of the year between eight in the morning and ſix in the afternoon.

(47) In ſupport of this principle the 3 Ed. I. c. 5. is generally cited: *Et pur ceo que elections deivent eſtres franches, le roi defende ſur ſa greve forfaiture, que nul haut homme n'autre per poiar des armes, ne per menaces, ne diſtourbe de faire franche election.* The principle is good, and ought to be applied to all elections; but the elections which the legiſlature had then in contemplation, were thoſe of the ſheriff, coroner, &c. for the houſe of commons, and of courſe elections of it's members, had not then exiſtence. And as it would be repugnant to this principle and to ſound policy, it is decided, that

For Mr. Locke[r] ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, "if he employs the force, "treasure, and offices of the society to corrupt the represent-"atives, or openly to pre-engage the electors, and prescribe "what manner of persons shall be chosen. For thus to re-"gulate candidates and electors, and new-model the ways of "election, what is it, says he, but to cut up the government "by the roots, and poison the very fountain of public secu-"rity?" As soon therefore as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended. Riots likewise have been frequently determined to make an election void. By vote also of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any
[179] members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

THUS are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted that no candidate shall, after the date (usually called the *teste*) of the writs (48), or after the va-

[r] on Gov. p. 2. § 222.

that a wager between two electors upon the success of their respective candidates is illegal and void. For, if it were permitted, it would manifestly corrupt the freedom of elections. 1 *T. R.* 55.

(48) Or after the ordering of the writs; that is, after the signing of the warrant to the chancellor for issuing the writs. *Sim.* 165.

cancy,

cancy, give any money or entertainment to his electors, or promiſe to give any, either to particular perſons, or to the place in general, in order to his being elected: on pain of being incapable to ſerve for that place in parliament (49).

(49) This incapacity ariſes from the 7 W. III. c. 4. commonly called the Treating Act, which enacts that the candidate offending againſt that ſtatute *ſhall be diſabled and incapacitated upon ſuch election.* The obvious meaning of theſe words and of the reſt of the ſtatute is, that treating vacates that election only, and that the candidate is no way diſqualified from being re-elected, and ſitting upon a ſecond return. See the ſecond caſe of Norwich 1787, 3 *Lud.* 455. Though the contrary was determined in the caſe of Honiton, 1782, *ib.* 162.

But after the general election in 1796 the return of one of the members for the borough of Southwark was declared void by a committee, becauſe it was proved that he had treated during the election. Upon that vacancy he offered himſelf again a candidate, and having a majority of votes was returned as duly elected; but upon the petition of the other candidate, the next committee determined that the ſitting member was ineligible, and that the petitioner ought to have been returned. And he took his ſeat accordingly.

It has been ſuppoſed, that the payment of travelling expences, and a compenſation for loſs of time, were not treating or bribery within this or any other ſtatute; and a bill paſſed the houſe of commons to ſubject ſuch caſes to the penalties impoſed by 2 Geo. II. c. 24. upon perſons guilty of bribery. But this bill was rejected in the houſe of lords by the oppoſition of lord Mansfield, who ſtrenuouſly maintained that the bill was ſuperfluous; that ſuch conduct by the laws in being, was clearly illegal, and ſubject, in a court of law, to the penalties of bribery, (2 *Lud.* 67.) Indeed it is ſo repugnant both to the letter and ſpirit of theſe ſtatutes, that it is ſurpriſing that ſuch a notion and practice ſhould ever have prevailed. It is certainly to be regretted, that any elector ſhould be prevented by his poverty from exerciſing a valuable privilege; but it probably would be a much greater injury to the country at large if it were deprived of the ſervices of all gentlemen of moderate fortune, by the legalizing of ſuch a practice, even with the moſt equitable reſtrictions, not to mention the door that it might open to the groſſeſt impurity and corruption.

And

And if any money, gift, office, employment, or reward be given or promiſed to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers ſuch bribe forfeits 500*l*, and is for ever diſabled from voting and holding any office in any corporation; unleſs, before conviction, he will diſcover ſome other offender of the ſame kind, and then he is indemnified for his own offence[s] (50). The firſt inſtance that occurs, of

[s] In like manner the Julian law *de ambitu* inflicted fines and infamy upon all who were guilty of corruption at elections; but, if the perſon guilty convicted another offender, he was reſtored to his credit again. *Ff.* 48. 14. 1.

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(50) This is enacted by 2 Geo. II. c. 24. explained and enlarged by 9 Geo. II. c. 38. and 16 Geo. II. c. 11. but theſe ſtatutes do not create any incapacity of ſitting in the houſe, that depends ſolely upon the treating act mentioned in the preceding note.

It has been held that it is bribery if a candidate gives an elector money to vote for him, though he afterwards votes for another (3 *Burr.* 1235.): and there can be no doubt, but it would alſo be bribery in the voter, for the words of the ſtatute clearly make the offence mutual. And it has been decided that ſuch vote will not be available to the perſon to whom it may afterwards be given gratuitouſly: for the elector ſwears he has received no money, gift, or reward, in order to give his vote; and an election ought not to depend upon a vote ſo contaminated with perjury, bribery, and treachery; and the voter's previous conduct muſt raiſe a ſtrong ſuſpicion that he gives his vote rather from the inducement of a higher bribe, than from the conviction of his conſcience. But the propriety of this deciſion has been queſtioned by reſpectable authority. (2 *Doug.* 416.) An inſtance is given in 4 *Doug.* 366. of an action, in which twenty-two penalties, 11,000*l.* were recovered againſt one defendant. But beſides the penalties impoſed by the legiſlature, bribery is a crime at common law, and puniſhable by indictment or information, though the court of king's bench will not in ordinary caſes grant an information within two years, the time within which an action may be brought for the penalties under the ſtatute. (3 *Burr.* 1335. 1359.) But this rule does not affect a proſecution

by

election bribery, was ſo early as 13 Eliz. when one Thomas Longe (being a ſimple man and of ſmall capacity to ſerve in parliament) acknowledged that he had given the returning officer and others of the borough for which he was choſen four pounds to be returned member, and was for that premium elected. But for this offence the borough was amerced (51), the member was removed, and the officer fined and impriſoned [t]. But, as this practice hath ſince taken much deeper and more univerſal root, it hath occaſioned the making of theſe wholeſome ſtatutes; to complete the efficacy of which, there is nothing wanting but reſolution and integrity to put them in ſtrict execution.

UNDUE influence being thus (I wiſh the depravity of mankind would permit me to ſay, effectually) guarded againſt, the election is to be proceeded to on the day appointed; the ſheriff or other returning officer firſt taking an oath againſt bribery, and for the due execution of his office. The candidates likewiſe, if required (52), muſt ſwear to their qualification; and the electors in counties to theirs; and the electors both in [180]

[t] 4 Inſt. 23. Hale of parl. 112. Com. Journ. 10 & 11 May 1571.

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by an indictment, or by an information by the attorney-general, who in one caſe was ordered by the houſe to proſecute two gentlemen who had procured themſelves to be returned by bribery; they were convicted and ſentenced by the court of king's bench to pay each a fine of 1000 marks, and to be impriſoned ſix months. 4 *Doug.* 292.

(51) Lord Mansfield obſerved upon this, that there could be no fine ſet in the houſe of commons; it muſt have been in the ſtar-chamber (3 *Burr.* 1336.); but the journals of the commons on the day referred to by the learned Judge expreſsly ſtate, that it is ordered by this houſe that a fine of 20 pounds be aſſeſſed upon the corporation for their ſaid lewd and ſlanderous attempt.

(52) If any candidate, upon a reaſonable requeſt from another candidate, or by two of the electors either at the election, or at any time before the return of the writ, ſhall refuſe to ſwear to his qualification, his election ſhall be void. (9 *Ann.* c. 5.)

counties

counties and boroughs are alſo compellable to take the oath of abjuration, and that againſt bribery and corruption. And it might not be amiſs, if the members elected were bound to take the latter oath, as well as the former; which in all probability would be much more effectual, than adminiſtering it only to the electors (53).

(53) All electors are compellable before they vote to take the oaths of allegiance and ſupremacy, 7 & 8 W. III. c. 27. But as theſe oaths were frequently required from the electors by one of the candidates for the purpoſe of delay, it was enacted by the 34 Geo. III. c. 73. that, when a poll is demanded at any election, the returning officer may, at the requeſt of any candidate, appoint two perſons, (or a ſufficient number,) at proper places, to adminiſter the oaths of allegiance and ſupremacy, the declaration of fidelity, the oath of abjuration, and the declaration or affirmation of the effect thereof, to each elector before he tenders his vote. The expence thereby incurred is to be borne equally by all the candidates. And by the 25 Geo. III. c. 84. all electors for cities and boroughs ſhall ſwear to their name, addition, or profeſſion, and place of abode; and alſo, like freeholders in counties, that they believe they are of the age of 21, and that they have not been polled before at that election. And by the ſame ſtatute it is enacted, that if a poll is demanded at any election for any county or place in England or Wales, it ſhall commence either that day, or at the fartheſt upon the next, and ſhall be continued from day to day (Sundays excepted) until it be finiſhed; and it ſhall be kept open ſeven hours at the leaſt each day, between eight in the morning and eight at night; but if it ſhould be continued till the 15th day, then the returning officer ſhall cloſe the poll at or before three in the afternoon, and ſhall immediately, or on the next day, publicly declare the names of the perſons who have a majority of votes; and he ſhall forthwith make a return accordingly, unleſs a ſcrutiny is demanded by any candidate, or by two or more of the electors, and he ſhall deem it neceſſary to grant the ſame, in which caſe it ſhall be lawful for him to proceed thereupon; but ſo as that, in all caſes of a general election, if he has the return of the writ, he ſhall cauſe a return of the members to be filed in the crown office on or before the day on which the writ is returnable. If he is a returning officer acting under a precept, he ſhall make a return of the members at leaſt ſix days before the day of the return of the writ;

THE election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority: and the sheriff returns the whole, together with the writ for the county and the knights elected thereupon, to the clerk of the crown in chancery; before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500 *l.* If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI, 100*l*; and the returning officer in boroughs for a like false return 40 *l*; and they are besides liable to an action, in which double damages shall be recovered, by the later statutes of king William: and any person bribing the returning officer shall also forfeit 300 *l.* But the members returned by him are the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute (54) 10 Geo. III. c. 16. (amended by 11

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writ; but if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within 30 days after the close of the poll. Upon a scrutiny, the returning officer cannot compel any witness to be sworn, though the statute gives him power to administer an oath to those who *consent* to take it.

(54) This statute is better known by the name of Grenville's act, and it has justly conferred immortal honour upon its author. The select committees appointed pursuant to this statute, have examined and decided the important rights of election with a degree of purity and judicial discrimination highly honourable to themselves; and which were still more satisfactory to the public, from the recollection of the very different manner in which these questions, prior to 1770, had been treated by the house at large.

But this act has been much improved by 25 Geo. III. c. 84. & 28 Geo. III. c. 52. By these statutes any person may present a petition complaining of an undue election; but one subscriber of the petition must enter into a recognizance, himself in 200*l.* with two sureties in 100*l.* each, to appear and support his petition; and then the house shall appoint some day beyond 14 days after the commencement of the session, or the return of the writ, and shall give notice to the petitioners and the sitting members to attend the bar

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Geo. III. c. 42. and made perpetual by 14 Geo. III. c. 15.) which directs the method of chuſing by lot a ſelect committee

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of the houſe on that day by themſelves, their counſel, or agents; this day, however, may be altered, but notice ſhall be given of the new day appointed. On the day fixed, if 100 members do not attend, the houſe ſhall adjourn from day to day, except over Sundays, and for any number of days over Chriſtmaſday, Whitſunday, and Good Friday; and when 100 or more members are preſent, the houſe ſhall proceed to no other buſineſs except ſwearing in members, receiving reports from committees, amending a return, or attending his majeſty or commiſſioners in the h[illegible] of lords. And by the 32 Geo. III. c. 1. the houſe is enabled to receive a meſſage from the lords, and to proceed to any buſineſs that may be neceſſary for the proſecution of an impeachment on the days appointed for the trial. Then the names of all the members belonging to the houſe are put into ſix boxes or glaſſes in equal numbers, and the clerk ſhall draw a name from each of the glaſſes in rotation, which name ſhall be read by the ſpeaker, and if the perſon is preſent, and not diſqualified, it is put down; and in this manner they proceed, till forty-nine ſuch names are collected. But beſides theſe forty-nine, each party ſhall ſelect, out of the whole number preſent, one perſon, who ſhall be the nominee of that party. Members who have voted at that election, or who are petitioners, or are petitioned againſt, cannot ſerve; and perſons who are ſixty years of age, or who have ſerved before, are excuſed if they require it; and others who can ſhew any material reaſon, may alſo be excuſed by the indulgence of the houſe. After 49 names are ſo drawn, liſts of them ſhall be given to the reſpective parties, who ſhall withdraw, and ſhall alternately ſtrike off one (the petitioners beginning) till they are reduced to 13; and theſe 13, with the two nominees, conſtitute the ſelect committee. If there are three parties, they ſhall alternately ſtrike off one: and in that caſe the 13 ſhall chuſe the two nominees.

The members of the committee ſhall then be ordered by the houſe to meet within 24 hours, and they cannot adjourn for more than 24 hours, except over Sunday, Chriſtmaſday, and Good Friday, without leave of the houſe; and no member of the committee ſhall abſent himſelf without the permiſſion of the houſe. The committee ſhall not in any caſe proceed to buſineſs with fewer than 13 members; and they are diſſolved if for three ſucceſſive days of ſitting their number is leſs than that, unleſs they have ſat 14 days, and then they may proceed, though reduced to 12; and

of fifteen members, who are ſworn well and truly to try the ſame, and a true judgment to give according to the evidence. And this abſtract of the proceedings at elections of knights, citizens, and burgeſſes, concludes our inquiries into the laws [181] and cuſtoms more peculiarly relative to the houſe of commons.

VI. I PROCEED now, ſixthly, to the method of making laws; which is much the ſame in both houſes: and I ſhall touch it very briefly, beginning in the houſe of commons. But firſt I muſt premiſe, that for diſpatch of buſineſs each houſe of parliament has it's ſpeaker. The ſpeaker of the houſe of lords, whoſe office is to preſide there, and manage the formality of buſineſs, is the lord chancellor, or keeper of the king's great ſeal, or any other appointed by the king's commiſſion: and, if none be ſo appointed, the houſe of lords (it is ſaid) may

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if 25 days, to 11; and they continue to ſit notwithſtanding a prorogation of the parliament. All the fifteen members of the committee take a ſolemn oath in the houſe, that they will give a true judgment according to the evidence, and every queſtion is determined by a majority.

The committee may ſend for witneſſes and examine them upon oath, a power which the houſe of commons does not poſſeſs; and if they report that the petition or defence is frivolous or vexatious, the party aggrieved ſhall recover coſts. For their mode of reporting the right of election, ſee note (35), p. 174.

By the 11 Geo. III. c. 42. if 100 or more members are preſent, but if upon the drawing by lot 49 not ſet aſide nor excuſed cannot be completed, the houſe ſhall then adjourn, as if 100 had not attended. And to prevent the public buſineſs being delayed by the want of a ſufficient attendance to form a ſelect committee, the 36 Geo. III. c. 59. has provided that when a ſufficient number of members are not preſent for that purpoſe, the houſe, before they adjourn, may proceed to the order for the call of the houſe, if it has been previouſly fixed for that day, or they may adjourn ſuch call, or they may order it to be called on any future day, and may make ſuch orders relative thereto as they think fit for enforcing a ſufficient attendance of the members.

Theſe are the principal proviſions of this excellent ſtatute under it's preſent improved ſtate.

elect (55). The ſpeaker of the houſe of commons is choſen by the houſe (56); but muſt be approved by the king (57).

(55) Such an inſtance in the Iriſh houſe of lords is mentioned by lord Mountmorres, 2 Vol. 108.

(56) Mr. Hume is miſtaken, who ſays that Peter de la Mere, choſen in the firſt parliament of R. II. was the firſt ſpeaker of the commons, (3 Vol. 3.); for we find in the rolls of parliament, (51 Ed. III. n° 87.) that ſir Thomas Hungerford, *chivalier, qui avoit les parolles des communes en ceſt parlement*, addreſſed the king in the name of the commons, in that jubilee year, to pray that he would pardon ſeveral perſons who had been convicted in impeachments.

By the 30 Geo. III. c. 16. the ſalary of the ſpeaker of the houſe of commons, including his fees and former allowances, is fixed at the clear yearly ſum of 6000*l.* And by the ſame ſtatute he is diſqualified from holding any office of profit under the crown during pleaſure.

(57) Sir Edward Coke, upon being elected ſpeaker in 1592, in his addreſs to the throne declared, "this is only as yet a nomination, "and no election, until your majeſty giveth allowance and appro-"bation." (2 *Hatſ.* 154.) But the houſe of commons at preſent would ſcarce admit their ſpeaker to hold ſuch language. Till ſir Fletcher Norton was elected ſpeaker, 29th Nov. 1774, every gentleman who was propoſed to fill that honourable office, affected great modeſty, and if elected, was almoſt forced into the chair, and at the ſame time he requeſted permiſſion to plead, in another place, his excuſes and inability to diſcharge the office, which he uſed to do upon being preſented to the king. But ſir Fletcher Norton was the firſt who diſregarded this ceremony both in the one houſe and in the other. His ſucceſſors, Mr. Cornewall and Mr. Addington, requeſted to make excuſes to the throne, but were refuſed by the houſe, though Mr. Addington, in the beginning of the preſent parliament, 26th Nov. 1790, followed the example of ſir Fletcher Norton, and intimated no wiſh to be excuſed. (See 1 *Woodd.* 59.) Sir John Cuſt was the laſt ſpeaker who addreſſed the throne in the language of diffidence, of which the following ſentence may ſerve as a ſpecimen: "I can now be an humble ſuitor to your majeſty, that you "would give your faithful commons an opportunity of rectifying "this the only inadvertent ſtep which they can ever take, and be "graciouſly pleaſed to direct them to preſent ſome other to your "majeſty, whom they may not hereafter be ſorry to have choſen, "nor your majeſty to have approved." (6 Nov. 1761.) The chancellor uſed to reply in a handſome ſpeech of compliment and encourage-

And herein the uſage of the two houſes differs, that the ſpeaker of the houſe of commons cannot give his opinion or argue any queſtion in the houſe; but the ſpeaker of the houſe of lords, if a lord of parliament, may. In each houſe the act of the majority (58) binds the whole; and this ma-

encouragement; but now he ſhortly informs the commons that his majeſty approves of their ſpeaker, who claims the antient privileges of the commons, and then they return to their own houſe.

Some ſpeakers upon this occaſion have acquired great honour and diſtinction, particularly Thomas Nevile, *germanus frater domini Burgavenny, qui electus prolocutor per communes ſacræ regiæ majeſtati eſt præſentatus, et ita egregiè, eleganter, prudenter, et diſertè in negotio ſibi commiſſo ſe geſſit, ut omnium præſentium plauſu et lætitiâ, maximam ſibi laudem comparavit, cujus laudi ſacra regia majeſtas non modicum eximium honoris cumulum adjecit, nam præſentibus et videntibus dominis ſpiritualibus et temporalibus et regni communibus eum equitis aurati honore et dignitate ad laudem Dei et ſancti Georgii inſignivit, quod nemini mortalium per ulla ante ſæcula contigiſſe audivimus.* 6 Hen. VIII. 1 Lords' Journ. 20.

(58) In the houſe of commons the ſpeaker never votes but when there is an equality without his caſting vote, which in that caſe creates a majority; but the ſpeaker of the houſe of lords has no caſting vote, but his vote is counted with the reſt of the houſe; and in the caſe of an equality, the non-contents or negative voices have the ſame effect and operation as if they were in fact a majority. (Lords' Journ. 25 June, 1661.) Lord Mountmorres ſays, that the houſe of lords in Ireland obſerves the ſame rule; and that in caſes of equality, *ſemper præſumitur pro negante.* (1 Vol. 105.) Hence the order in putting the queſtion in appeals and writs of error is this "Is it your lordſhips' pleaſure that this decree or "judgment ſhall be reverſed?" for if the votes are equal, the judgment of the court below is affirmed. (*Ib.* 2 Vol. 81.) Here it may not be improper to obſerve that there is no caſting voice in courts of juſtice; but in the ſuperior courts if the judges are equally divided, there is no deciſion, and the cauſe is continued in court till a majority concur. At the ſeſſions the juſtices, in caſe of equality, ought to reſpite the matter till the next ſeſſions: but if they are equal one day, and the matter is duly brought before them on another day in the ſame ſeſſions, and if there is then an inequality, it will amount to a judgment; for all the time of the ſeſſions is conſidered but as one day. A caſting vote ſometimes ſignifies the ſingle vote of a perſon, who never votes but in the caſe of an equality;

jority is declared by votes openly and publicly given: not as at Venice, and many other ſenatorial aſſemblies, privately or by ballot. This latter method may be ſerviceable, to prevent intrigues and unconſtitutional combinations: but is impoſſible to be practiſed with us; at leaſt in the houſe of commons, where every member's conduct is ſubject to the future cenſure of his conſtituents, and therefore ſhould be openly ſubmitted to their inſpection.

To bring a bill into the houſe, if the relief ſought by it is of a private nature, it is firſt neceſſary to prefer a petition, which muſt be preſented by a member, and uſually ſets forth the grievance defired to be remedied. This petition (when founded on facts that may be in their nature diſputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the houſe; and then (or otherwiſe, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the houſe, without any petition at all. Formerly, all bills were drawn in the form of petitions (59), which were entered

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ſometimes the double vote of a perſon, who firſt votes with the reſt, and then, upon an equality, creates a majority by giving a ſecond vote.

A caſting vote neither exiſts in corporations or elſewhere, unleſs it is expreſsly given by ſtatute or charter, or, what is equivalent, exiſts by immemorial uſage.

(59) The commons for near two centuries continued the ſtyle of very humble petitioners. Their petitions frequently began with "your poor commons beg and pray," and concluded with "for "God's ſake, and as an act of charity:"—*Vos poveres communes prient et ſupplient, pur Dieu et en oevre de charité.* (Rot. Parl. paſſim.) It appears that prior to the reign of Hen. V. it had been the practice of the kings to add and enact more than the commons petitioned for. In conſequence of this there is a very memorable petition from the commons in 2 Hen. V. which ſtates that it is the liberty and freedom of the commons that there ſhould be no ſtatute without their aſſent, conſidering that they have ever been as well *aſſenters* as *petitioners*, and therefore they pray that for the future there may be no additions or diminutions to their petitions. And in anſwer to this the king granted that from henceforth they ſhould be bound in no inſtance without their aſſent, ſaving his royal prerogative

upon the *parliament rolls*, with the king's anſwer thereunto ſubjoined; not in any ſettled form of words, but as the circumſtances of the caſe required [t]: and at the end of each parliament, the judges drew them into the form of a ſtatute, which was entered on the *ſtatute rolls*. In the reign of Henry V, to prevent miſtakes and abuſes, the ſtatutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry VI, bills in the form of acts, according to the modern cuſtom, were firſt introduced.

THE perſons directed to bring in the bill, preſent it in a competent time to the houſe, drawn out on paper, with a multitude of blanks, or void ſpaces, where any thing occurs that is dubious, or neceſſary to be ſettled by the parliament itſelf; (ſuch eſpecially, as the preciſe date of times, the nature and quantity of penalties, or of any ſums of money to be raiſed) being indeed only the ſceleton of the bill. In the houſe of lords, if the bill begins there, it is (when of a private nature) referred to two of the judges, to examine and report the ſtate of the facts alleged, to ſee that all neceſſary parties conſent, and to ſettle all points of technical propriety. This is read a firſt time, and at a convenient diſtance a ſecond time; and after each reading the ſpeaker opens to the houſe the ſubſtance of the bill, and puts the queſtion, whether it ſhall proceed any farther. The introduction of the bill may be originally oppoſed, as the bill itſelf may at either of the readings; and, if the oppoſition ſucceeds, the bill muſt be

[t] See, among numberleſs other inſtances, the *articuli cleri*, 9 Edw. II.

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tive to grant or deny what he pleaſed of their petitions. (*Ruff. Pref.* xv. *Rot. Parl.* 2 *Hen. V.* n° 22.) It was long after their creation, or rather ſeparation from the barons, before the houſe of commons were conſcious of their own ſtrength and dignity: and ſuch was their modeſty and diffidence, that they uſed to requeſt the lords to ſend them ſome of their members to inſtruct them in their duty, "on account of the arduouſneſs of their charge, and the feebleneſs "of their own powers and underſtandings:"—*pur l'arduité de lour charge, et le feobleſſe de lour poiars et ſens.* (Rot. Parl. 1 R. II. n° 4.)

dropped for that ſeſſion: as it muſt alſo, if oppoſed with ſucceſs in any of the ſubſequent ſtages.

AFTER the ſecond reading it is committed, that is, referred to a committee; which is either ſelected by the houſe in matters of ſmall importance, or elſe, upon a bill of conſequence, the houſe reſolves itſelf into a committee of the whole houſe. A committee of the whole houſe is compoſed of every member; and, to form it, the ſpeaker quits the chair, (another member being appointed chairman,) and may ſit and debate as a private member. In theſe committees the bill is debated clauſe by clauſe, amendments made, the blanks filled up, and ſometimes the bill entirely new modelled. After it
[183] has gone through the committee, the chairman reports it to the houſe with ſuch amendments as the committee have made; and then the houſe reconſiders the whole bill again, and the queſtion is repeatedly put upon every clauſe and amendment. When the houſe hath agreed or diſagreed to the amendments of the committee, and ſometimes added new amendments of it's own, the bill is then ordered to be engroſſed, or written in a ſtrong groſs hand, on one or more long rolls (or preſſes) of parchment ſewed together. When this is finiſhed, it is read a third time, and amendments are ſometimes then made to it; and if a new clauſe be added, it is done by tacking a ſeparate piece of parchment on the bill, which is called a ryder[u]. The ſpeaker then again opens the contents; and, holding it up in his hands, puts the queſtion, whether the bill ſhall paſs. If this is agreed to, the title to it is then ſettled; which uſed to be a general one for all the acts paſſed in the ſeſſion, till in the firſt year of Henry VIII diſtinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and deſire their concurrence; who, attended by ſeveral more, carries it to the bar of the houſe of peers, and there delivers it to their ſpeaker, who comes down from his woolſack to receive it.

IT there paſſes through the ſame forms as in the other houſe, (except engroſſing, which is already done,) and, if

[u] Noy. 84.

rejected,

rejected, no more notice is taken, but it paſſes *ſub ſilentio*, to prevent unbecoming altercations. But if it is agreed to, the lords ſend a meſſage by two maſters in chancery (or upon matters of high dignity or importance, by two of the judges) that they have agreed to the ſame: and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, ſuch amendments are ſent down with the bill to receive the concurrence of the commons. If the commons diſagree to the amendments, a conference uſually follows between members deputed from each houſe; who for the moſt part ſettle and adjuſt the difference: but, if both houſes remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is ſent back to the lords by one of the members, with a meſſage to acquaint them therewith. The ſame forms are obſerved, *mutatis mutandis*, [184] when the bill begins in the houſe of lords. But, when an act of grace or pardon is paſſed, it is firſt ſigned by his majeſty, and then read once only in each of the houſes, without any new engroſſing or amendment [w]. And when both houſes have done with any bill, it always is depoſited in the houſe of peers, to wait the royal aſſent; except in the caſe of a bill of ſupply, which after receiving the concurrence of the lords is ſent back to the houſe of commons [x].

THE royal aſſent may be given two ways: 1. In perſon; when the king comes to the houſe of peers, in his crown and royal robes, and ſending for the commons to the bar, the titles of all the bills that have paſſed both houſes are read; and the king's anſwer is declared by the clerk of the parliament in Norman-French (60): a badge, it muſt be owned, (now the only

[w] D'ewes's journ. 20. 73. Com. journ. 17 June 1747.

[x] Com. journ. 24 Jul. 1660.

(60) Until the reign of Richard III. all the ſtatutes are either in French or Latin, but generally in French. I have never ſeen any reaſon aſſigned for this change in the language of the ſtatutes. Richard being an uſurper, probably thought that it would procure him a degree of popularity to give the people ſtatutes in

one remaining,) of conqueſt; and which one could wiſh to ſee fall into total oblivion, unleſs it be reſerved as a ſolemn memento to remind us that our liberties are mortal, having once been deſtroyed by a foreign force. If the king conſents to a public bill, the clerk uſually declares, "*le roy le veut*, the king wills it "ſo to be;" if to a private bill, "*ſoit fait comme il eſt deſiré*, be it "as it is deſired." If the king refuſes his aſſent, it is in the gentle language of "*le roy s'aviſera* (61), the king will adviſe upon it." When a bill of ſupply is paſſed, it is carried up and preſented to the king by the ſpeaker of the houſe of commons[y]; and the royal aſſent is thus expreſſed, "*le roy remercie ſes loyal ſubjects*, "*accepte lour benevolence, et auſſi le veut*, the king thanks his

[y] *Rot. Parl.* 9 *Hen. IV.* in Pryn. 4 Inſt. 30, 31.

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their own language, which had hitherto been as illegible as the laws of Caligula. But the general anſwers of the king to the bills were ſo well underſtood, that a change in them was of no importance to the people, and only deſirable for the ſake of conſiſtency.

(61) The words *le roi s'aviſera* correſpond to the phraſe formerly uſed by courts of juſtice, when they required time to conſider of their judgment, viz. *curia adviſare vult*. And there can be little doubt but originally theſe words implied a ſerious intent to take the ſubject under conſideration, and they only became in effect a negative, when the bill or petition was annulled by a diſſolution, before the king communicated the reſult of his deliberation: for in the rolls of parliament the king ſometimes anſwers, that the petition is unreaſonable, and cannot be granted; ſometimes he anſwers, that he and his council will conſider of it; as in 37 Ed. III. n° 33. *Quant au ceſte article, il demande grand aviſement, et partant le roi ſe ent aviſera par ſon conſeil.*

This prerogative of rejecting bills was exerciſed to ſuch an extent in ancient times, that D'ewes informs us, that queen Elizabeth, at the cloſe of one ſeſſion, gave her aſſent to 24 public and 19 private bills; and at the ſame time rejected 48, which had paſſed the two houſes of parliament. (*Journ.* 596.) But the laſt time it was exerted was in the year 1692 by William III. who at firſt refuſed his aſſent to the bill for triennial parliaments, but was prevailed upon to permit it to be enacted two years afterwards. *De Lolme*, 404.

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" loyal ſubjects, accepts their benevolence, and wills it ſo to " be." In caſe of an act of grace, which originally proceeds from the crown, and has the royal aſſent in the firſt ſtage of it, the clerk of the parliament thus pronounces the gratitude of the ſubject; " *les prelats, ſeigneurs, et commons, en ce preſent* " *parliament aſſemblees, au nom de touts vous autres ſubjects. re-*" *mercient tres humblement vatre majeſte, et prient a Dieu vous* [185] " *donner en ſante bone vie et longue*; the prelates, lords, and " commons, in this preſent parliament aſſembled, in the name " of all your other ſubjects, moſt humbly thank your majeſty, " and pray to God to grant you in health and wealth long " to live [z]." 2. By the ſtatute 33 Hen. VIII. c. 21. the king may give his aſſent by letters patent under his great ſeal, ſigned with his hand, and notified in his abſence to both houſes aſſembled together in the high houſe. And, when the bill has received the royal aſſent in either of theſe ways, is is then, and not before, a ſtatute or act of parliament.

THIS ſtatute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was neceſſary by the civil law with regard to the emperor's edicts: becauſe every man in England is, in judgment of law, party to the making of an act of parliament, being preſent thereat by his repreſentatives. However, a copy thereof is uſually printed at the king's preſs for the information of the whole land. And formerly, before the invention of printing, it was uſed to be publiſhed by the ſheriff of every county; the king's writ being ſent to him at the end of every ſeſſion, together with a tranſcript of all the acts made at that ſeſſion, commanding him, " *ut ſtatuta illa, et omnes articulos* " *in eiſdem contentos, in ſingulis locis ubi expedire viderit, publice* " *proclamari, et firmiter teneri et obſervari faciat.*" And the uſage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which cuſtom continued till the reign of Henry the ſeventh [a].

AN act of parliament, thus made, is the exerciſe of the higheſt authority that this kingdom acknowleges upon earth.

[z] D'ewes journ. 35. [a] 3 Inſt. 41. 4 Inſt. 26.

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It hath power to bind every ſubject in the land, and the dominions thereunto belonging; nay, even the king himſelf, if particularly named therein. And it cannot be altered, [186] amended, diſpenſed with, ſuſpended, or repealed, but in the ſame forms and by the ſame authority of parliament: for it is a maxim in law, that it requires the ſame ſtrength to diſſolve, as to create an obligation. It is true it was formerly held, that the king might in many caſes diſpenſe with penal ſtatutes [b]: but now by ſtatute 1 W. & M. ſt. 2. c. 2. it is declared that the ſuſpending or diſpenſing with laws by regal authority, without conſent of parliament, is illegal.

VII. THERE remains only, in the ſeventh and laſt place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or diſſolved.

AN adjournment is no more than a continuance of the ſeſſion from one day to another, as the word itſelf ſignifies: and this is done by the authority of each houſe ſeparately every day; and ſometimes for a fortnight or a month together, as at Chriſtmas or Eaſter, or upon other particular occaſions. But the adjournment of one houſe is no adjournment of the other [c]. It hath alſo been uſual, when his majeſty hath ſignified his pleaſure that both or either of the houſes ſhould adjourn themſelves to a certain day, to obey the king's pleaſure ſo ſignified, and to adjourn accordingly [d]. Otherwiſe, beſides the indecorum of a refuſal, a prorogation would aſſuredly follow; which would often be very inconvenient to both public and private buſineſs. For prorogation puts an end to the ſeſſion; and then ſuch bills as are only begun and not perfected, muſt be reſumed *de novo* (if at all) in a ſubſequent ſeſſion: whereas, after an adjournment, all things continue in the ſame ſtate as at the time of the adjournment made, and may be proceeded on without any freſh commencement.

[b] Finch. L. 81. 234. Bacon. Elem. c. 19.

[c] 4 Inſt. 28.

[d] Com. journ. *paſſim*: *e. g.* 11 Jun. 1572. 5 Apr. 1604. 4 Jun. 14 Nov. 18 Dec. 1621. 11 Jul. 1625. 13 Sept. 1660. 25 Jul. 1667. 4 Aug. 1685. 24 Feb. 1691. 2 1 Jun. 1712. 16 Apr. 1717. 3 Feb. 1741. 10 Dec. 1745. 21 May 1768.

A PROROGATION is the continuance of the parliament from one ſeſſion to another, as an adjournment is the continuation of the ſeſſion from day to day. This is done by the royal authority, expreſſed either by the lord chancellor in his majeſty's preſence, or by commiſſion from the crown, or frequently by proclamation (62). Both houſes are neceſſarily prorogued at the ſame time; it not being a prorogation of the houſe of lords, or commons, but of the parliament. The ſeſſion is never underſtood to be at an end until a prorogation: though, unleſs ſome act be paſſed or ſome judgment given in parliament, it is in truth no ſeſſion at all[c] (63). And

[c] 4 Inſt. 28. Hale of parl. 38. Hut. 61.

(62) At the beginning of a new parliament, when it is not intended that the parliament ſhould meet at the return of the writ of ſummons for the diſpatch of buſineſs, the practice is, to prorogue it by a writ of prorogation, as the parliament in 1790 was prorogued twice by writ; *Comm. Journ.* 26th Nov. 1790; and the firſt parliament in this reign was prorogued by four writs. *Ib.* 3 Nov. 1761. On the day upon which the writ of ſummons is returnable, the members of the houſe of commons who attend, do not enter their own houſe, or wait for a meſſage from the lords, but go immediately up to the houſe of lords, where the chancellor reads the writ of prorogation. *Ib.* And when it is intended that they ſhould meet upon the day to which the parliament is prorogued for diſpatch of buſineſs, notice is given by a proclamation.

(63) Mr. Hatſell mentions one great inconvenience which, he apprehends, might ariſe from this rule:—The 6 Ann. c. 7. ſ. 6. provides, that upon the death of the king, if there is no parliament in being *that has met and ſat*, then the laſt preceding parliament ſhall immediately convene and ſit, as if the ſaid parliament had never been diſſolved. He ſays, the conſtruction of the words *has met and ſat*, has always been underſtood to be a parliament of which a ſeſſion has been held. (2 *Hatſ.* 219.)—This is a conſtruction to which I cannot accede. The word *ſeſſion* has a legal and technical ſignification; we know it's property and conſequences, but there is no reaſon that we ſhould annex them all to the popular word *ſit*. The object of the ſtatute was probably this, viz. if the king ſhould die after the iſſuing the writs for a new parliament during a general election, that the kingdom ſhould not continue in a ſtate of ferment and confuſion, but that the old parliament ſhould immediately revive and convene,

formerly the uſage was, for the king to give the royal aſſent to all ſuch bills as he approved, at the end of every ſeſſion, and then to prorogue the parliament; though ſometimes only for a day or two[f]; after which all buſineſs then depending in the houſes was to be begun again. Which cuſtom obtained ſo ſtrongly, that it once became a queſtion[g], whether giving the royal aſſent to a ſingle bill did not of courſe put an end to the ſeſſion. And, though it was then reſolved in the negative, yet the notion was ſo deeply rooted, that the ſtatute 1 Car. I. c. 7. was paſſed to declare, that the king's aſſent to that and ſome other acts ſhould not put an end to the ſeſſion; and, even ſo late as the reign of Charles II, we find a proviſo frequently tacked to a bill[h], that his majeſty's aſſent thereto ſhould not

f Com. journ. 21 Oct. 1553.
g *Ibid.* 21 Nov. 1554.
h Stat. 12 Car. II. c. 1. 22 & 23 Car. II. c. 1.

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convene. It never could be the intention of the legiſlature, that, after the members of a new parliament had qualified themſelves, and had been ſitting perhaps for many weeks, this parliament upon the death of the king ſhould be ſent home, and the members of the old parliament ſhould be collected, merely becauſe the new parliament had not paſſed a bill. I conceive it would be ſufficient to ſatisfy the proviſion of this ſtatute, that ſuch a number of members had met, and had taken the oaths, as to actually conſtitute a houſe in each houſe of parliament. To ſit in this caſe muſt be equivalent to take their ſeats, which is it's ſignification in the ſame ſentence, viz. *to convene and ſit*, otherwiſe the new king would be compelled to make a ſeſſion, by aſſenting to a bill before he prorogued or diſſolved them. But to guard againſt any inconvenience, which might eventually ariſe from the uncertainty of theſe words, that part of the ſtatute 6 Ann. c. 7. is repealed by the 37 Geo. III. c. 127. which enacts, that in caſe of the demiſe of his majeſty between the diſſolution of the parliament and the day appointed by the writs of ſummons, then the laſt preceding parliament ſhall immediately convene and ſit, and continue for ſix months unleſs ſooner prorogued or diſſolved by the new king; but if the king dies on the day appointed for aſſembling the new parliament, or at any time after ſuch day, and before ſuch new parliament ſhall have met and ſat, then the new parliament in like manner ſhall meet and ſit for the ſpace of ſix months unleſs ſooner prorogued or diſſolved.

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determine the ſeſſion of parliament. But it now ſeems to be allowed, that a prorogation muſt be expreſsly made, in order to determine the ſeſſion. And, if at the time of an actual rebellion, or imminent danger of invaſion, the parliament ſhall be ſeparated by adjournment or prorogation, the king is empowered[1] to call them together by proclamation, with fourteen days notice of the time appointed for their reaſſembling (64).

A DISSOLUTION is the civil death of the parliament; and this may be effected three ways: 1. By the king's will, expreſſed either in perſon or by repreſentation. For, as the king has the ſole right of convening the parliament, ſo alſo

[1] Stat. 30 Geo. II. c. 25.

(64) This was provided by a clauſe in ſeveral militia acts, but that proviſion is materially altered by the 26 Geo. III. c. 107. It has been held that after a prorogation, except under the circumſtances and in the manner deſcribed in that ſtatute, the king cannot ſummon a parliament before the day to which it was laſt prorogued. And it is underſtood, that when a parliament is prorogued to a certain day, they do not meet on that day, unleſs it be particularly declared by the proclamation that gives notice of the prorogation, that they ſhall meet for the diſpatch of buſineſs; and when it has not been prorogued by ſuch a proclamation, and it is intended that parliament ſhall actually ſit, it is the eſtabliſhed practice to iſſue a proclamation to give notice that it is for the diſpatch of buſineſs; and this proclamation, unleſs upon ſome urgent occaſion, bears date at leaſt forty days before the meeting. (2 *Haſ.* 239.) But by 26 Geo. III. c. 107. ſ. 95. in all caſes of actual invaſion or imminent danger of it, and in caſes of rebellion or inſurrection, the king having firſt communicated the occaſion to parliament, if ſitting, and if no parliament be ſitting, having notified the occaſion by proclamation, may order the militia to be called out and embodied. And whenever this is done, if the parliament be adjourned or prorogued, he ſhall convene them within fourteen days.

Purſuant to this ſtatute the parliament met on the 13th Dec. 1792; but now in all caſes it is enacted by the 37 Geo. III. c. 127. that whenever his majeſty is pleaſed to iſſue his proclamation, giving notice of his intention that parliament ſhall meet for the diſpatch of buſineſs on any day not leſs than fourteen days from the date of the proclamation, the parliament ſhall thereby ſtand prorogued to that day, notwithſtanding any previous prorogation to a longer day.

it is a branch of the royal prerogative, that he may (whenever he pleaſes) prorogue the parliament for a time, or put a final period to it's exiſtence. If nothing had a right to prorogue or diſſolve a parliament but itſelf, it might happen to become perpetual. And this would be extremely dangerous, if at any time it ſhould attempt to encroach upon the executive power: as was fatally experienced by the unfortunate king Charles the firſt; who, having unadviſedly paſſed an act to continue the parliament then in being till ſuch time as it ſhould pleaſe to diſſolve itſelf, at laſt fell a ſacrifice to that inordinate power, which he himſelf had conſented to give them. It is therefore extremely neceſſary that the crown ſhould be empowered to regulate the duration of theſe aſſemblies, under the limitations which the Engliſh conſtitution has preſcribed: ſo that, on the one hand, they may frequently and regularly come together, for the diſpatch of buſineſs, and redreſs of grievances; and may not, on the other, even with the conſent of the crown, be continued to an inconvenient or unconſtitutional length.

2. A PARLIAMENT may be diſſolved by the demiſe of the crown. This diſſolution formerly happened immediately upon the death of the reigning ſovereign: for he being conſidered in law as the head of the parliament, (*caput principium, et finis,*) that failing, the whole body was held to be extinct. But, the calling a new parliament immediately on the inauguration of the ſucceſſor being found inconvenient, and dangers being apprehended from having no parliament in being in caſe of a diſputed ſucceſſion, it was enacted by the ſtatutes 7 & 8 W. III. c. 15. and 6 Ann. c. 7. that the parliament in being ſhall continue for ſix months after the death of any king or queen, unleſs ſooner prorogued or diſſolved by the ſucceſſor: that, if the parliament be, at the time of the king's death, ſeparated by adjournment or prorogation, it ſhall notwithſtanding aſſemble immediately: and that, if no parliament is then in being, the members of the laſt parliament ſhall aſſemble, and be again a parliament.

[189] 3. LASTLY, a parliament may be diſſolved or expire by length of time. For if either the legiſlative body were perpetual;

petual; or might laſt for the life of the prince who convened them, as formerly; and were ſo to be ſupplied, by occaſionally filling the vacancies with new repreſentatives; in theſe caſes, if it were once corrupted, the evil would be paſt all remedy: but when different bodies ſucceed each other, if the people ſee cauſe to diſapprove of the preſent, they may rectify it's faults in the next. A legiſlative aſſembly alſo, which is ſure to be ſeparated again, (whereby it's members will themſelves become private men, and ſubject to the full extent of the laws which they have enacted for others,) will think themſelves bound, in intereſt as well as duty, to make only ſuch laws as are good. The utmoſt extent of time that the ſame parliament was allowed to ſit, by the ſtatute 6 W. & M. c. 2, was *three* years; after the expiration of which, reckoning from the return of the firſt ſummons, the parliament was to have no longer continuance. But by the ſtatute 1 Geo. I. ſt. 2. c. 38. (in order, profeſſedly, to prevent the great and continued expences of frequent elections, and the violent heats and animoſities conſequent thereupon, and for the peace and ſecurity of the government then juſt recovering from the late rebellion) this term was prolonged to *ſeven* years: and, what alone is an inſtance of the vaſt authority of parliament, the very ſame houſe, that was choſen for three years, enacted it's own continuance for ſeven (65). So that, as our conſtitution now ſtands, the parliament muſt expire, or die a natural death, at the end of every ſeventh year; if not ſooner diſſolved by the royal prerogative.

(65) This has been thought by many an unconſtitutional exertion of their authority; and the reaſon given is, that thoſe who had a power delegated to them for three years only, could have no right to extend that term to ſeven years. But this has always appeared to me to be a fallacious mode of conſidering the ſubject. Before the triennial act, 6 W & M. the duration of parliament was only limited by the pleaſure or death of the king; and it never can be ſuppoſed that the next, or any ſucceeding parliament, had not the power of repealing the triennial act; and if that had been done, then, as before, they might have ſat ſeventeen or ſeventy years. It is certainly true, that the ſimple repeal of a former ſtatute would have extended their continuance much beyond what was done by the ſeptennial act.

CHAPTER THE THIRD.

OF THE KING, AND HIS TITLE.

THE ſupreme executive power of theſe kingdoms is veſted by our laws in a ſingle perſon, the king or queen: for it matters not to which ſex the crown deſcends; but the perſon entitled to it, whether male or female, is immediately inveſted with all the enſigns, rights, and prerogatives of ſovereign power; as is declared by ſtatute 1 Mar. ſt. 3. c. 1.

IN diſcourſing of the royal rights and authority, I ſhall conſider the king under ſix diſtinct views: 1. With regard to his title. 2. His royal family. 3. His councils. 4. His duties. 5. His prerogative. 6. His revenue. And firſt, with regard to his title.

THE executive power of the Engliſh nation being veſted in a ſingle perſon, by the general conſent of the people, the evidence of which general conſent is long and immemorial uſage, it became neceſſary to the freedom and peace of the ſtate, that a rule ſhould be laid down, uniform, univerſal, and permanent; in order to mark out with preciſion, *who* is that ſingle perſon, to whom are committed (in ſubſervience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the higheſt importance to the public tranquillity, and to the conſciences of

of private men, that this rule ſhould be clear and indiſputable: and our conſtitution has not left us in the dark upon this material occaſion. It will therefore be the endeavour of this chapter to trace out the conſtitutional doctrine of the royal ſucceſſion, with that freedom and regard to truth, yet mixed with that reverence and reſpect, which the principles of liberty and the dignity of the ſubject require.

THE grand fundamental maxim upon which the *jus coronae*, or right of ſucceſſion to the throne of theſe kingdoms, depends, I take to be this: "that the crown is, by common "law and conſtitutional cuſtom, hereditary; and this in a "manner peculiar to itſelf: but that the right of inheritance "may from time to time be changed or limited by act of "parliament; under which limitations the crown ſtill con-"tinues hereditary." And this propoſition it will be the buſineſs of this chapter to prove, in all it's branches; firſt, that the crown is hereditary; ſecondly, that it is hereditary in a manner peculiar to itſelf; thirdly, that this inheritance is ſubject to limitation by parliament; laſtly, that when it is ſo limited, it is hereditary in the new proprietor.

1. FIRST, it is in general *hereditary*, or deſcendible to the next heir, on the death or demiſe of the laſt proprietor. All regal governments muſt be either hereditary or elective: and, as I believe there is no inſtance wherein the crown of England has ever been aſſerted to be elective, except by the regicides at the infamous and unparalleled trial of king Charles I, it muſt of conſequence be hereditary. Yet while I aſſert an hereditary, I by no means intend a *jure divino*, title to the throne. Such a title may be allowed to have ſubſiſted under the theocratic eſtabliſhments of the children of Iſrael in Paleſtine: but it never yet ſubſiſted in any other country; ſave only ſo far as kingdoms, like other human fabricks, are ſubject to the general and ordinary diſpenſations of providence. Nor indeed have a *jure divino* and an *hereditary* right any neceſſary connexion with each other; as ſome have very weakly imagined. The titles of David and Jehu were

equally *jure divino*, as thoſe of either Solomon or Ahab; and yet David ſlew the ſons of his predeceſſor, and Jehu his predeceſſor himſelf. And when our kings have the ſame warrant as they had, whether it be to ſit upon the throne of their fathers, or to deſtroy the houſe of the preceding ſovereign, they will then, and not before, poſſeſs the crown of England by a right like theirs, *immediately* derived from heaven. The hereditary right which the laws of England acknowlege, owes it's origin to the founders of our conſtitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one ſociety having no connexion with, or influence upon, the fundamental polity of another. The founders of our Engliſh monarchy might perhaps, if they had thought proper, have made it an elective monarchy: but they rather choſe, and upon good reaſon, to eſtabliſh originally a ſucceſſion by inheritance. This has been acquieſced in by general conſent; and ripened by degrees into common law; the very ſame title that every private man has to his own eſtate. Lands are not naturally deſcendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to eſtabliſh hereditary ſucceſſion in the one as well as the other.

IT muſt be owned, an elective monarchy ſeems to be the moſt obvious, and beſt ſuited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from hiſtory that, in the infancy and firſt rudiments of almoſt every ſtate, the leader, chief magiſtrate, or prince, hath uſually been elective. And, if the individuals who compoſe that ſtate could always continue true to firſt principles, uninfluenced by paſſion or prejudice, unaſſailed by corruption, and unawed by violence, elective ſucceſſion were as much to be deſired in a kingdom, as in other inferior communities. The beſt, the wiſeſt, and the braveſt man would then be ſure of receiving that crown, which his endowments have merited; and the ſenſe of an unbiaſſed majority would be dutifully acquieſced in by the few who were

of different opinions. But hiſtory and obſervation will inform us, that elections of every kind (in the preſent ſtate of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the caſe is otherwiſe, theſe practices will be often ſuſpected, and as conſtantly charged upon the ſucceſsful, by a ſplenetic diſappointed minority. This is an evil to which all ſocieties are liable; as well thoſe of a private and domeſtic kind, as the great community of the public, which regulates and includes the reſt. But in the former there is this advantage; that ſuch ſuſpicions, if falſe, proceed no farther than jealouſies and murmurs, which time will effectually ſuppreſs; and, if true, the injuſtice may be remedied by legal means, by an appeal to thoſe tribunals to which every member of ſociety has (by becoming ſuch) virtually engaged to ſubmit. Whereas, in the great and independent ſociety, which every nation compoſes, there is no ſuperior to reſort to but the law of nature; no method to redreſs the infringements of that law but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; ſo in one and the ſame nation, when the fundamental principles of their common union are ſuppoſed to be invaded, and more eſpecially when the appointment of their chief magiſtrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the only proceſs by which the appeal can be carried on is that of a civil and inteſtine war. An hereditary ſucceſſion to the crown is therefore now eſtabliſhed, in this and moſt other countries, in order to prevent that periodical bloodſhed and miſery, which the hiſtory of antient imperial Rome, and the more modern experience of Poland and Germany, may ſhew us are the conſequences of elective kingdoms.

2. BUT, ſecondly, as to the particular mode of inheritance, it in general correſponds with the feodal path of deſcents, chalked out by the common law in the ſucceſſion to landed eſtates; yet with one or two material exceptions. Like eſtates, the crown will deſcend lineally to the iſſue of the reign-

ing monarch: as it did from king John to Richard II, through
[194] a regular pedigree of ſix lineal generations. As in common deſcents, the preference of males to females, and the right of primogeniture among the males, are ſtrictly adhered to. Thus Edward V ſucceeded to the crown in preference to Richard his younger brother and Elizabeth his elder ſiſter. Like lands or tenements, the crown, on failure of the male line, deſcends to the iſſue female; according to the ancient Britiſh cuſtom remarked by Tacitus[a]; "*ſolent foeminarum "ductu bellare, et ſexum in imperiis non diſcernere.*" Thus Mary I ſucceeded to Edward VI; and the line of Margaret queen of Scots, the daughter of Henry VII, ſucceeded on failure of the line of Henry VIII, his ſon. But, among the females, the crown deſcends by right of primogeniture to the eldeſt daughter only and her iſſue; and not, as in common inheritances, to all the daughters at once; the evident neceſſity of a ſole ſucceſſion to the throne having occaſioned the royal law of deſcents to depart from the common law in this reſpect: and therefore queen Mary on the death of her brother ſucceeded to the crown alone, and not in partnerſhip with her ſiſter Elizabeth. Again: the doctrine of repreſentation prevails in the deſcent of the crown, as it does in other inheritances; whereby the lineal deſcendants of any perſon deceaſed ſtand in the ſame place as their anceſtor, if living, would have done. Thus Richard II ſucceeded his grandfather Edward III, in right of his father the black prince; to the excluſion of all his uncles, his grandfather's younger children. Laſtly, on failure of lineal deſcendants, the crown goes to the next collateral relations of the late king; provided they are lineally deſcended from the blood royal, that is, from that royal ſtock which originally acquired the crown. Thus Henry I ſucceeded to William II, John to Richard I, and James I to Elizabeth; being all derived from the conqueror, who was then the only regal ſtock. But herein there is no objection (as in the caſe of common deſcents) to the ſucceſſion of a brother, an uncle, or other collateral relation, of the *half* blood; that is, where the relationſhip proceeds not from the ſame

[a] *In vit. Agricolae.*

couple

couple of anceſtors (which conſtitutes a kinſman of the *whole* blood) but from a *ſingle* anceſtor only; as when two perſons are derived from the ſame father, and not from the ſame mother, or *vice verſa*: provided only, that the one anceſtor, [195] from whom both are deſcended, be that from whoſe veins the blood royal is communicated to each. Thus Mary I inherited to Edward VI, and Elizabeth inherited to Mary; all children of the ſame father, king Henry VIII, but all by different mothers. The reaſon of which diverſity, between royal and common deſcents, will be better underſtood hereafter, when we examine the nature of inheritances in general.

3. THE doctrine of *hereditary* right does by no means imply an *indefeaſible* right to the throne. No man will, I think, aſſert this, that has conſidered our laws, conſtitution, and hiſtory, without prejudice, and with any degree of attention. It is unqueſtionably in the breaſt of the ſupreme legiſlative authority of this kingdom, the king and both houſes of parliament, to defeat this hereditary right; and, by particular entails, limitations, and proviſions, to exclude the immediate heir, and veſt the inheritance in any one elſe. This is ſtrictly conſonant to our laws and conſtitution; as may be gathered from the expreſſion ſo frequently uſed in our ſtatute book, of "the king's majeſty, his heirs, and ſucceſſors." In which we may obſerve, that as the word, "heirs," neceſſarily implies an inheritance or hereditary right, generally ſubſiſting in the royal perſon; ſo the word, "ſucceſſors," diſtinctly taken, muſt imply that this inheritance may ſometimes be broken through; or, that there may be a ſucceſſor, without being the heir, of the king. And this is ſo extremely reaſonable, that without ſuch a power, lodged ſomewhere, our polity would be very defective. For, let us barely ſuppoſe ſo melancholy a caſe, as that the heir apparent ſhould be a lunatic, an idiot, or otherwiſe incapable of reigning: how miſerable would the condition of the nation be, if he were alſo incapable of being ſet aſide!—It is therefore neceſſary that this power ſhould be lodged ſomewhere: and yet the inheritance, and regal dignity, would be very precarious indeed, if this

power were *expreſsly* and *avowedly* lodged in the hands of the ſubject only, to be exerted whenever prejudice, caprice, or diſcontent ſhould happen to take the lead. Conſequently it can no where be ſo properly lodged as in the two houſes of
[196] parliament, by and with the conſent of the reigning king; who, it is not to be ſuppoſed, will agree to any thing improperly prejudicial to the rights of his own deſcendants. And therefore in the king, lords, and commons, in parliament aſſembled, our laws have expreſsly lodged it.

4. BUT, fourthly; however the crown may be limited or transferred, it ſtill retains it's deſcendible quality, and becomes hereditary in the wearer of it. And hence in our law the king is ſaid never to die, in his political capacity; though, in common with other men, he is ſubject to mortality in his natural: becauſe immediately upon the natural death of Henry, William, or Edward, the king ſurvives in his ſucceſſor. For the right of the crown veſts, *eo inſtanti*, upon his heir; either the *haeres natus*, if the courſe of deſcent remains unimpeached, or the *haeres factus*, if the inheritance be under any particular ſettlement. So that there can be no *interregnum* (1); but, as ſir Matthew Hale [b] obſerves, the right of ſovereignty is fully inveſted in the ſucceſſor by the very deſcent of the crown. And therefore, however acquired, it becomes in him abſolutely hereditary, unleſs by the rules of the limitation it is otherwiſe ordered and determined. In the ſame manner as landed eſtates, to continue our former compariſon, are by the law hereditary, or deſcendible to the heirs of the owner; but ſtill there exiſts a power, by which the property of thoſe lands may be transferred to another perſon. If this transfer be made ſimply and abſolutely, the lands will be hereditary in the new owner, and deſcend to his heir at law: but if the transfer be clogged with any limitations, conditions, or en-

[b] 1 Hiſt. P. C. 61.

(1) Hence the ſtatutes paſſed in the firſt year after the reſtoration of Car. II. are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

tails,

tails, the lands muſt deſcend in that channel, ſo limited and preſcribed, and no other.

IN theſe four points conſiſts, as I take it, the conſtitutional notion of hereditary right to the throne: which will be ſtill farther elucidated, and made clear beyond all diſpute, from a ſhort hiſtorical view of the ſucceſſions to the crown of England, the doctrines of our antient lawyers, and the ſeveral acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar the hereditary title to the throne. And in the purſuit of this in- [197] quiry we ſhall find, that, from the days of Egbert, the firſt ſole monarch of this kingdom, even to the preſent, the four cardinal maxims above-mentioned have ever been held the conſtitutional canons of ſucceſſion. It is true, the ſucceſſion, through fraud, or force, or ſometimes through neceſſity, when in hoſtile times the crown deſcended on a minor or the like, has been very frequently ſuſpended; but has generally at laſt returned back into the old hereditary channel, though ſometimes a very conſiderable period has intervened. And, even in thoſe inſtances where the ſucceſſion has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the uſurpers themſelves were ſo ſenſible, that they for the moſt part endeavoured to vamp up ſome feeble ſhew of a title by deſcent, in order to amuſe the people, while they gained the poſſeſſion of the kingdom. And, when poſſeſſion was once gained, they conſidered it as the purchaſe or acquiſition of a new eſtate of inheritance, and tranſmitted or endeavoured to tranſmit it to their own poſterity, by a kind of hereditary right of uſurpation.

KING Egbert about the year 800, found himſelf in poſſeſſion of the throne of the weſt Saxons, by a long and undiſturbed deſcent from his anceſtors of above three hundred years. How his anceſtors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of ſuch high antiquity, as muſt render all inquiries at beſt but plauſible

gueſſes. His right muſt be ſuppoſed indiſputably good, becauſe we know no better. The other kingdoms of the heptarchy he acquired, ſome by conſent, but moſt by a voluntary ſubmiſſion. And it is an eſtabliſhed maxim in civil polity, and the law of nations, that when one country is united to another in ſuch a manner, as that one keeps it's government and ſtates, and the other loſes them; the latter entirely aſſimilates with or is melted down in the former, and muſt adopt it's laws and cuſtoms [c]. And in purſuance of this maxim there hath ever been, ſince the union of the
[198] heptarchy in king Egbert, a general acquieſcence under the hereditary monarchy of the weſt Saxons, through all the united kingdoms.

FROM Egbert to the death of Edmund Ironſide, a period of above two hundred years, the crown deſcended regularly, through a ſucceſſion of fifteen princes, without any deviation or interruption: ſave only that the ſons of king Ethelwolf ſucceeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of ſucceſſion preſcribed by their father, and confirmed by the wittena-gemote, in the heat of the Daniſh invaſions; and alſo that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew a minor, the times being very troubleſome and dangerous. But this was with a view to preſerve, and not to deſtroy, the ſucceſſion; and accordingly Edwy ſucceeded him.

KING Edmund Ironſide was obliged, by the hoſtile irruption of the Danes, at firſt to divide his kingdom with Canute king of Denmark; and Canute, after his death, ſeiſed the whole of it, Edmund's ſons being driven into foreign countries. Here the ſucceſſion was ſuſpended by actual force, and a new family introduced upon the throne: in whom however this new acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was reſtored in the perſon of Edward the confeſſor.

[c] Puff. L. of N. and N. b. 8. c. 12. § 6.

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HE was not indeed the true heir to the crown, being the younger brother of king Edmund Ironſide, who had a ſon Edward, ſirnamed (from his exile) the outlaw, ſtill living. But this ſon was then in Hungary; and, the Engliſh having juſt ſhaken off the Daniſh yoke, it was neceſſary that ſomebody on the ſpot ſhould mount the throne; and the confeſſor was the next of the royal line then in England. On his deceaſe without iſſue, Harold II uſurped the throne; and almoſt at the ſame inſtant came on the Norman invaſion: the right to the crown being all the time in Edgar, ſirnamed Atheling, (which ſignifies in the Saxon language *illuſtrious*, or of royal blood,) who was the ſon of Edward the outlaw, and grandſon of Edmund Ironſide; or, as Matthew Paris[d] well expreſſes [199] the ſenſe of our old conſtitution, "*Edmundus autem latuſ-*"*ferreum, rex naturalis de ſtirpe regum, genuit Edwardum;*"*et Edwardus genuit Edgarum, cui de jure debebatur regnum*"*Anglorum.*"

WILLIAM the Norman claimed the crown by virtue of a pretended grant from king Edward the confeſſor; a grant which, if real, was in itſelf utterly invalid: becauſe it was made, as Harold well obſerved in his reply to William's demand[e], "*abſque generali ſenatus, et populi conventu et edicto;*" which alſo very plainly implies, that it then was generally underſtood that the king, with conſent of the general council, might diſpoſe of the crown and change the line of ſucceſſion. William's title however was altogether as good as Harold's, he being a mere private ſubject, and an utter ſtranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently aſſerted by the Engliſh nobility after the conqueſt, till ſuch time as he died without iſſue: but all their attempts proved unſucceſsful, and only ſerved the more firmly to eſtabliſh the crown in the family which had newly acquired it.

THIS conqueſt then by William of Normandy was, like that of Canute before, a forcible transfer of the crown of

[d] *A. D.* 1066. [e] William of Malmſb. *l.* 7.

England

England into a new family; but, the crown being ſo tranſferred, all the inherent properties of the crown were with it transferred alſo. For, the victory obtained at Haſtings not being[f] a victory over the nation collectively, but only over the perſon of Harold, the only right that the conqueror could pretend to acquire thereby, was the right to poſſeſs the crown of England, not to alter the nature of the government. And therefore, as the Engliſh laws ſtill remained in force, he muſt neceſſarily take the crown ſubject to thoſe laws, and with all it's inherent properties; the firſt and principal of which was it's deſcendibility. Here then we muſt drop our race of Saxon kings, at leaſt for a while, and derive our deſcents from William the conqueror as from a new ſtock, who acquired by right of war (ſuch as it is, yet ſtill the *der-*
[200] *nier reſort* of kings) a ſtrong and undiſputed title to the inheritable crown of England.

ACCORDINGLY it deſcended from him to his ſons William II and Henry I. Robert, it muſt be owned, his eldeſt ſon, was kept out of poſſeſſion by the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for ſome time in the law of deſcents, (though never adopted as the rule of public ſucceſſions[g]) that when the eldeſt ſon was already provided for, (as Robert was conſtituted duke of Normandy by his father's will,) in ſuch a caſe the next brother was entitled to enjoy the reſt of their father's inheritance. But, as he died without iſſue, Henry at laſt had a good title to the throne, whatever he might have at firſt.

STEPHEN of Blois, who ſucceeded him, was indeed the grandſon of the conqueror, by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the neareſt of the male line, but as the neareſt male of the blood royal, excepting his elder brother Theobald; who was earl of Blois, and therefore ſeems to have waved, as he certainly never inſiſted on, ſo troubleſome and preca-

[f] Hale, Hiſt. C. L. c. 5. Seld. review of tithes, c. 8.

[g] See lord Lyttleton's life of Henry II. Vol. I. p. 467.

rious

rious a claim. The real right was in the empreſs Matilda or Maud, the daughter of Henry I; the rule of ſucceſſion being (where women are admitted at all) that the daughter of a ſon ſhall be preferred to the ſon of a daughter. So that Stephen was little better than a mere uſurper; and therefore he rather choſe to rely on a title by election[h], while the empreſs Maud did not fail to aſſert her hereditary right by the ſword: which diſpute was attended with various ſucceſs, and ended at laſt in the compromiſe made at Wallingford, that Stephen ſhould keep the crown, but that Henry the ſon of Maud ſhould ſucceed him; as he afterwards accordingly did.

HENRY, the ſecond of that name, was (next after his mother Matilda) the undoubted heir of William the conqueror; but he had alſo another connexion in blood, which endeared him ſtill farther to the Engliſh. He was lineally deſcended [201] from Edmund Ironſide, the laſt of the Saxon race of hereditary kings. For Edward the outlaw, the ſon of Edmund Ironſide, had (beſides Edgar Atheling, who died without iſſue) a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right reſided. By Malcolm ſhe had ſeveral children, and among the reſt Matilda the wife of Henry I, who by him had the empreſs Maud, the mother of Henry II. Upon which account the Saxon line is in our hiſtories frequently ſaid to have been reſtored in his perſon: though in reality that right ſubſiſted in the *ſons* of Malcolm by queen Margaret; king Henry's beſt title being as heir to the conqueror.

FROM Henry II the crown deſcended to his eldeſt ſon Richard I, who dying childleſs, the right veſted in his nephew Arthur, the ſon of Geoffrey his next brother: but John, the youngeſt ſon of king Henry, ſeiſed the throne; claiming, as appears from his charters, the crown by hereditary right[i]:

[h] "*Ego Stephanus Dei gratia aſſenſu cleri et populi in regem Anglorum electus &c.*" (*Cart. A. D.* 1136. Ric. de Hagustald 314. Hearne *ad Guil. Neubr.* 711.)

[i] "—*Regni Angliae; quod nobis jure competit haereditario.*" Spelm. *Hiſt. R. Joh. apud* Wilkins 354.

that

that is to ſay, he was next of kin to the deceaſed king, being his ſurviving brother: whereas Arthur was removed one degree farther, being his brother's ſon, though by right of repreſentation he ſtood in the place of his father Geoffrey. And however flimſy this title, and thoſe of William Rufus and Stephen of Blois, may appear at this diſtance to us, after the law of deſcents hath now been ſettled for ſo many centuries, they were ſufficient to puzzle the underſtandings of our brave, but unlettered, anceſtors. Nor indeed can we wonder at the number of partizans, who eſpouſed the pretenſions of king John in particular; ſince even in the reign of his father king Henry II, it was a point undetermined [i]; whether, even in common inheritances, the child of an elder brother ſhould ſucceed to the land in right of repreſentation, or the younger ſurviving brother in right of proximity of blood. Nor is it to this day decided in the collateral ſucceſſion to the fiefs of the empire, whether the order of the ſtocks, or the proximity of degree, ſhall take place [k]. However,
[202] on the death of Arthur and his ſiſter Eleanor without iſſue, a clear and indiſputable title veſted in Henry III the ſon of John: and from him to Richard the ſecond, a ſucceſſion of ſix generations, the crown deſcended in the true hereditary line. Under one of which race of princes [l] we find it declared in parliament, "that the law of the crown of Eng-"land is, and always hath been, that the children of the "king of England, whether born in England or elſewhere, "ought to bear the inheritance after the death of their an-"ceſtors. Which law our ſovereign lord the king, the pre-"lates, earls, and barons, and other great men, together "with all the commons in parliament aſſembled, do ap-"prove and affirm for ever."

UPON Richard the ſecond's reſignation of the crown, he having no children, the right reſulted to the iſſue of his grandfather Edward III. That king had many children, beſides his eldeſt, Edward the black prince of Wales, the father of Richard II: but to avoid confuſion I ſhall only mention

[i] Glanv. *l.* 7. *c.* 3.
[k] Mod. Un. Hiſt. xxx. 512.
[l] Stat. 25 Edw. III. ſt. 2.

three; William his ſecond ſon, who died without iſſue; Lionel duke of Clarence, his third ſon; and John of Gant, duke of Lancaſter, his fourth. By the rules of ſucceſſion therefore the poſterity of Lionel duke of Clarence were entitled to the throne upon the reſignation of king Richard; and had accordingly been declared by the king, many years before, the preſumptive heirs of the crown: which declaration was alſo confirmed in parliament [m]. But Henry duke of Lancaſter, the ſon of John of Gant, having then a large army in the kingdom, the pretence of raiſing which was to recover his patrimony from the king, and to redreſs the grievances of the ſubject, it was impoſſible for any other title to be aſſerted with any ſafety; and he became king under the title of Henry IV. But, as ſir Matthew Hale remarks [n], though the people unjuſtly aſſiſted Henry IV in his uſurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror, (which he very much inclined to do [o],) but as a ſucceſſor, deſcended by right line of the blood royal; as appears from the rolls of parliament in thoſe times. And in order to this he ſet up a ſhew of two titles: the one upon the pretence of being the firſt of the blood royal [203] in the entire male line, whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the houſe of York deſcended; the other, by reviving an exploded rumour, firſt propagated by John of Gant, that Edmond earl of Lancaſter (to whom Henry's mother was heireſs) was in reality the elder brother of king Edward I; though his parents, on account of his perſonal deformity, had impoſed him on the world for the younger; and therefore Henry would be entitled to the crown, either as ſucceſſor to Richard II, in caſe the entire male line was allowed a preference to the female; or, even prior to that unfortunate prince, if the crown could deſcend through a female, while an entire male line was exiſting.

[m] Standford's geneal. hiſt. 246.
[n] Hiſt. C. L. c. 5.
[o] Seld. tit. hon. 1. 3.

HOWEVER,

HOWEVER, as in Edward the third's time we find the parliament approving and affirming the law of the crown, as before ſtated, ſo in the reign of Henry IV they actually exerted their right of new-ſettling the ſucceſſion to the crown. And this was done by the ſtatute 7 Hen. IV. c. 2. whereby it is enacted, "that the inheritance of the crown and realms of "England and France, in all other the king's dominions, "ſhall be *ſet and remain*[p] in the perſon of our ſovereign lord "the king, and the heirs of his body iſſuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body iſſuing, with remainder to the lord Thomas, lord John, and lord Humphry, the king's ſons, and the heirs of their bodies reſpectively: which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however ſerves to ſhew that it was then generally underſtood, that the king and parliament had a right to new-model and regulate the ſucceſſion to the crown: and we may alſo obſerve, with what caution and delicacy the parliament then avoided declaring any ſentiment of Henry's original title. However ſir Edward Coke more than once expreſsly declares[q], that at the time of
[204] paſſing this act the right of the crown was in the deſcent from Philippa, daughter and heir of Lionel duke of Clarence.

NEVERTHELESS the crown deſcended regularly from Henry IV to his ſon and grandſon Henry V and VI; in the latter of whoſe reigns the houſe of York aſſerted their dormant title; and, after imbruing the kingdom in blood and confuſion for ſeven years together, at laſt eſtabliſhed it in the perſon of Edward IV. At his acceſſion to the throne, after a breach of the ſucceſſion that continued for three deſcents, and above threeſcore years, the diſtinction of a king *de jure* and a king *de facto* began to be firſt taken; in order to indemnify ſuch as had ſubmitted to the late eſtabliſhment, and to provide for the peace of the kingdom by confirming all honours conferred and all acts done, by thoſe who were now called the uſurpers,

[p] *ſoit mys et demeerge.* [q] 4 Inſt. 37. 205.

not

not tending to the diſheriſon of the rightful heir. In ſtatute 1 Edw. IV. c. 1. the three Henrys are ſtiled, "late kings of "England ſucceſſively in dede, and not of ryght." And, in all the charters which I have met with of king Edward, wherever he has occaſion to ſpeak of any of the line of Lancaſter, he calls them "*nuper de facto, et non de jure, reges Angliae.*"

EDWARD IV left two ſons and a daughter; the eldeſt of which ſons, king Edward V, enjoyed the regal dignity for a very ſhort time, and was then depoſed by Richard his unnatural uncle, who immediately uſurped the royal dignity; having previouſly inſinuated to the populace a ſuſpicion of baſtardy in the children of Edward IV, to make a ſhew of ſome hereditary title: after which he is generally believed to have murdered his two nephews; upon whoſe death the right of the crown devolved to their ſiſter Elizabeth.

THE tyrannical reign of king Richard III gave occaſion to Henry earl of Richmond to aſſert his title to the crown. A title the moſt remote and unaccountable that was ever ſet up, and which nothing could have given ſucceſs to, but the univerſal deteſtation of the then uſurper Richard. For, beſides that he claimed under a deſcent from John of Gant, whoſe title was now exploded, the claim (ſuch as it was) was through John earl of Somerſet, a baſtard ſon, begotten by John of Gant upon Catherine Swinford. It is true, that, by an act [205] of parliament 20 Ric. II, this ſon was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock: but ſtill, with an expreſs reſervation of the crown, "*excepta dignitate regali*[r]."

NOTWITHSTANDING all this, immediately after the battle of Boſworth-field, he aſſumed the regal dignity; the right of the crown then being, as ſir Edward Coke expreſsly declares[s], in Elizabeth, eldeſt daughter of Edward IV: and his poſſeſſion was eſtabliſhed by parliament, holden the firſt year of his reign. In the act for which purpoſe, the parlia-

[r] 4 Inſt. 36. [s] *Ibid.* 37.

ment

ment ſeems to have copied the caution of their predeceſſors in the reign of Henry IV: and therefore (as lord Bacon the hiſtorian of this reign obſerves) carefully avoided any recognition of Henry VII's right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might ſeem to be created and conferred upon him; and therefore a middle way was rather choſen, by way (as the noble hiſtorian expreſſes it) of *eſtabliſhment*, and that under covert and indifferent words, "that the in-"heritance of the crown ſhould *reſt*, *remain*, and *abide* in "king Henry VII and the heirs of his body:" thereby providing for the future, and at the ſame time acknowleging his preſent poſſeſſion; but not determining either way, whether that poſſeſſion was *de jure* or *de facto* merely. However, he ſoon after married Elizabeth of York, the undoubted heireſs of the conqueror, and thereby gained (as ſir Edward Coke declares[t]) by much his beſt title to the crown. Whereupon the act made in his favour was ſo much diſregarded, that it never was printed in our ſtatute books.

HENRY the eighth, the iſſue of this marriage, ſucceeded to the crown by clear indiſputable hereditary right, and tranſmitted it to his three children in ſucceſſive order. But in his reign we at ſeveral times find the parliament buſy in regulating the ſucceſſion to the kingdom. And, firſt, by ſta-
[206] tute 25 Hen. VIII. c. 12. which recites the miſchiefs which have and may enſue by diſputed titles, becauſe no perfect and ſubſtantial proviſion hath been made by law concerning the ſucceſſion; and then enacts, that the crown ſhall be entailed to his majeſty, and the ſons or heirs male of his body; and in default of ſuch ſons to the lady Elizabeth (who is declared to be the king's eldeſt iſſue female, in excluſion of the lady Mary, on account of her ſuppoſed illegitimacy by the divorce of her mother queen Catherine) and to the lady Elizabeth's heirs of her body; and ſo on from iſſue female to iſſue female, and the heirs of their bodies, by courſe of inheritance according to their ages, *as the crown of England hath been accuſtomed*

[t] 4 Inſt. 37.

and

and ought to go, in caſe where there be heirs female of the ſame: and in default of iſſue female, then to the king's right heirs for ever. This ſingle ſtatute is an ample proof of all the four poſitions we at firſt ſet out with.

BUT, upon the king's divorce from Ann Boleyn, this ſtatute was, with regard to the ſettlement of the crown, repealed by ſtatute 28 Hen. VIII. c. 7. wherein the lady Elizabeth is alſo, as well as the lady Mary, baſtardized, and the crown ſettled on the king's children by queen Jane Seymour, and his future wives; and, in defect of ſuch children, then with this remarkable remainder, to ſuch perſons as the king by letters patent, or laſt will and teſtament, ſhould limit and appoint the ſame. A vaſt power; but notwithſtanding, as it was regularly veſted in him by the ſupreme legiſlative authority, it was therefore indiſputably valid. But this power was never carried into execution; for by ſtatute 35 Hen. VIII. c. 1. the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their reſpective bodies; which ſucceſſion took effect accordingly, being indeed no other than the uſual courſe of the law, with regard to the deſcent of the crown.

BUT leſt there ſhould remain any doubt in the minds of the people, through this jumble of acts for limiting the ſucceſſion, by ſtatute 1 Mar. ſt. 2. c. 1. queen Mary's hereditary right to the throne is acknowleged and recognized in [207] theſe words: "the crown of theſe realms is moſt lawfully, "juſtly, and rightly *deſcended* and come to the queen's "highneſs that now is, being the very, true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the ſtatute which ſettles the preliminaries of that match [t], the hereditary right to the crown is thus aſſerted and declared: "as touching the "right of the queen's inheritance in the realm and domi-

[t] 1 Mar. ſt. 2. c. 2.

"..nions of England, the children, whether male or female, "shall ſucceed in them, according to the known laws, ſta- "tutes, and cuſtoms of the ſame." Which determination of the parliament, that the ſucceſſion *ſhall* continue in the uſual courſe, ſeems tacitly to imply a power of new-modelling and altering it, in caſe the legiſlature had thought proper.

ON queen Elizabeth's acceſſion, her right is recognized in ſtill ſtronger terms than her ſiſter's; the parliament acknowleging[u], "that the queen's highneſs is, and in very deed "and of moſt mere right ought to be, by the laws of God, "and the laws and ſtatutes of this realm, our moſt lawful "and rightful ſovereign liege lady and queen; and that "her highneſs is rightly, lineally, and lawfully deſcended "and come of the blood royal of this realm of England; "in and to whoſe princely perſon, and to the heirs of her "body lawfully to be begotten, after her, the imperial "crown and dignity of this realm doth belong." And in the ſame reign, by ſtatute 13 Eliz. c. 1. we find the right of parliament to direct the ſucceſſion of the crown aſſerted in the moſt explicit words. "If any perſon ſhall hold, af- "firm, or maintain that the common laws of this realm, "not altered by parliament, ought not to direct the right "of the crown of England; or that the queen's majeſty, "with and by the authority of parliament, is not able to "make laws and ſtatutes of ſufficient force and validity, to "limit and bind the crown of this realm, and the deſcent, "limitation, inheritance, and government thereof;—ſuch "perſon, ſo holding, affirming, or maintaining, ſhall, during
[208] "the life of the queen, be guilty of high treaſon; and after "her deceaſe ſhall be guilty of a miſdemeſnor, and forfeit "his goods and chattels."

ON the death of queen Elizabeth, without iſſue, the line of Henry VIII became extinct. It therefore became neceſſary to recur to the other iſſue of Henry VII by Elizabeth of York his queen; whoſe eldeſt daughter Margaret having

[u] Stat. 1 Eliz. c. 3.

married

married James IV king of Scotland, king James the ſixth of Scotland, and of England the firſt, was the lineal deſcendant from that alliance. So that in his perſon, as clearly as in Henry VIII, centered all the claims of different competitors, from the conqueſt downwards, he being indiſputably the lineal heir of the conqueror. And, what is ſtill more remarkable, in his perſon alſo centered the right of the Saxon monarchs, which had been ſuſpended from the conqueſt till his acceſſion. For, as was formerly obſerved, Margaret the ſiſter of Edgar Atheling, the daughter of Edward the outlaw, and grand-daughter of king Edmund Ironſide, was the perſon in whom the hereditary right of the Saxon kings, ſuppoſing it not aboliſhed by the conqueſt, reſided. She married Malcolm king of Scotland; and Henry II, by a deſcent from Matilda their daughter, is generally called the reſtorer of the Saxon line. But it muſt be remembered, that Malcolm by his Saxon queen had ſons as well as daughters; and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family king James the firſt was the direct lineal heir, and therefore united in his perſon every poſſible claim by hereditary right to the Engliſh as well as Scottiſh throne, being the heir both of Egbert and William the conqueror.

AND it is no wonder that a prince of more learning than wiſdom, who could deduce an hereditary title for more than eight hundred years, ſhould eaſily be taught by the flatterers of the times, to believe there was ſomething divine in this right, and that the finger of Providence was viſible in it's preſervation. Whereas, though a wiſe inſtitution, it was [209] clearly a human inſtitution; and the right inherent in him no natural, but a poſitive right. And in this and no other light was it taken by the Engliſh parliament (2); who by

(2) It is difficult to ſay in what light it was conſidered by that parliament, which, in the preamble to the ſtatute, declares with nauſeous pedantry, that "upon the knees of their hearts they

ſtatute 1 Jac. I. c. 1. did "recognize and acknowlege that "immediately upon the diſſolution and deceaſe of Elizabeth "late queen of England, the imperial crown thereof did by "inherent birthright, and lawful and undoubted ſucceſſion, "deſcend and come to his moſt excellent majeſty, as being "lineally, juſtly, and lawfully, next and ſole heir of the "blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it exiſted any where, muſt be ſought for among the *aborigines* of the iſland, the ancient Britons; among whoſe princes indeed ſome have gone to ſearch it for him [w].

BUT wild and abſurd as the doctrine of divine right moſt undoubtedly is, it is ſtill more aſtoniſhing, that when ſo many human hereditary rights had centered in this king, his ſon and heir king Charles the firſt ſhould be told by thoſe infamous judges who pronounced his unparalleled ſentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper perſon, for his conduct. The confuſion, inſtability, and madneſs, which followed the fatal cataſtrophe of that pious and unfortunate prince, will be a ſtanding argument in favour of hereditary monarchy to all future ages; as they proved at laſt to the then deluded people: who, in order to recover that peace and happineſs which for twenty years together they had loſt, in a ſolemn parliamentary convention of the ſtates reſtored the right heir of the crown. And in the proclamation for that purpoſe, which was drawn up and attended by both houſes [x], they declared, "that, according to their duty and allegi-"ance, they did heartily, joyfully, and unanimouſly ac-

[w] Elizabeth of York, the mother of queen Margaret of Scotland, was heireſs of the houſe of Mortimer. And Mr. Carte obſerves, that the houſe of Mortimer, in virtue of it's deſcent from Gladys only ſiſter to Lewellin ap Jorwerth the great, had the true right to the principality of Wales. Hiſt. Eng. iii. 705.

[x] Com. Journ. 8 May 1660.

"agniſe their conſtant faith, obedience, and loyalty to his majeſty "and his royal progeny."

"knowlege

"knowlege and proclaim, that immediately upon the de-
"ceaſe of our late ſovereign lord king Charles, the imperial [210]
"crown of theſe realms did by inherent birthright and law-
"ful and undoubted ſucceſſion deſcend and come to his moſt
"excellent majeſty Charles the ſecond, as being lineally,
"juſtly, and lawfully, next heir of the blood royal of this
"realm: and thereunto they moſt humbly and faithfully
"did ſubmit and oblige themſelves, their heirs, and poſterity
"for ever."

THUS I think it clearly appears, from the higheſt authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown; though ſubject to limitations by parliament. The remainder of this chapter will conſiſt principally of thoſe inſtances, wherein the parliament has aſſerted or exerciſed this right of altering and limiting the ſucceſſion; a right which, we have ſeen, was before exerciſed and aſſerted in the reigns of Henry IV, Henry VII, Henry VIII, queen Mary, and queen Elizabeth.

THE firſt inſtance, in point of time, is the famous bill of excluſion, which raiſed ſuch a ferment in the latter end of the reign of king Charles the ſecond. It is well known that the purport of this bill was to have ſet aſide the king's brother and preſumptive heir, the duke of York, from the ſucceſſion, on the ſcore of his being a papiſt; that it paſſed the houſe of commons, but was rejected by the lords; the king having alſo declared beforehand, that he never would be brought to conſent to it. And from this tranſaction we may collect two things: 1. That the crown was univerſally acknowleged to be hereditary; and the inheritance indefeaſible unleſs by parliament: elſe it had been needleſs to prefer ſuch a bill. 2. That the parliament had a power to have defeated the inheritanee: elſe ſuch a bill had been ineffectual. The commons acknowleged the hereditary right then ſubſiſting; and the lords did not diſpute the power, but merely the propriety, of an excluſion. However, as the bill took no effect, king James the ſecond ſucceeded to the throne of his anceſtors;

and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which (with other concurring circumſtances) brought on the revolution in 1688."

[211] THE true ground and principle, upon which that memorable event proceeded, was an entirely new caſe in politics, which had never before happened in our hiſtory; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of ſucceſſion, and a new limitation of the crown, by the king and both houſes of parliament: it was the act of the nation alone, upon a conviction that there was no king in being. For in a full aſſembly of the lords and commons, met in a convention upon the ſuppoſition of this vacancy, both houſes [y] came to this reſolution; "that king James the ſecond, having endeavoured "to ſubvert the conſtitution of the kingdom, by breaking "the original contract between king and people; and, by "the advice of jeſuits and other wicked perſons, having vio-"lated the fundamental laws; and having withdrawn him-"ſelf out of this kingdom; has abdicated the government, "and that the throne is thereby vacant." Thus ended at once, by this ſudden and unexpected vacancy of the throne, the old line of ſucceſſion; which from the conqueſt had laſted above ſix hundred years, and from the union of the heptarchy in king Egbert almoſt nine hundred. The facts themſelves thus appealed to, the king's endeavour to ſubvert the conſtitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himſelf out of the kingdom, were evident and notorious: and the conſequences drawn from theſe facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the perſon of the king himſelf, but alſo all his heirs, and rendered the throne abſolutely and completely vacant) it belonged to our anceſtors to determine (3). For, when-

[y] Com. Journ. 7 Feb. 1688.

(3) The convention in Scotland drew the ſame concluſion, viz. the vacancy of the throne, from premiſes and in language much more bold and intelligible. The myſtery of the declaration of the Engliſh

ever a queſtion ariſes between the ſociety at large and any magiſtrate veſted with powers originally delegated by that ſociety, it muſt be decided by the voice of the ſociety itſelf: there is not upon earth any other tribunal to reſort to. And that theſe conſequences were fairly deduced from theſe facts, our anceſtors have ſolemnly determined, in a full parliamentary convention repreſenting the whole ſociety. The reaſons upon which they decided may be found at large in the par- [212] liamentary proceedings of the times; and may be matter of inſtructive amuſement for us to contemplate, as a ſpeculative point of hiſtory. But care muſt be taken not to carry this inquiry farther, than merely for inſtruction or amuſement. The idea, that the conſciences of poſterity were concerned in the rectitude of their anceſtors' deciſions, gave birth to thoſe dangerous political hereſies, which ſo long diſtracted the ſtate, but at length are all happily extinguiſhed. I therefore rather chuſe to conſider this great political meaſure upon the ſolid footing of authority, than to reaſon in it's favour from it's juſtice, moderation, and expedience: becauſe that might imply a right of diſſenting or revolting from it, in caſe we ſhould think it to have been unjuſt, oppreſſive, or inexpedient. Whereas, our anceſtors having moſt indiſputably a competent juriſdiction to decide this great and important queſtion, and having in fact decided it, it is now become our duty at this diſtance of time to acquieſce in their

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Engliſh convention, betrays that timidity which it was intended to conceal. "The eſtates of the kingdom of Scotland find and "declare, that king James ſeventh, being a profeſſed papiſt, did "aſſume the royal power, and acted as a king, without ever "taking the oath required by law; and had, by the advice of "evil and wicked counſellors, invaded the fundamental conſtitu- "tion of this kingdom, and altered it from a legal and limited "monarchy to an arbitrary deſpotic power; and had governed "the ſame to the ſubverſion of the proteſtant religion and viola- "tion of the laws and liberties of the nation, inverting all the "ends of government, whereby he had *forefaulted* the crown, "and the throne was become vacant." *Tyndal*, 71. *Fol. Cont. of Rapin.*

determination; being born under that eſtabliſhment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

BUT, while we reſt this fundamental tranſaction, in point of authority, upon grounds the leaſt liable to cavil, we are bound both in juſtice and gratitude to add, that it was conducted with a temper and moderation which naturally aroſe from it's equity; that, however it might in ſome reſpects go beyond the letter of our antient laws, (the reaſon of which will more fully appear hereafter [z],) it was agreeable to the ſpirit of our conſtitution, and the rights of human nature; and that though in other points (owing to the peculiar circumſtances of things and perſons) it was not altogether ſo perfect as might have been wiſhed, yet from thence a new aera commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and underſtood, and the rights of the ſubject more explicitly guarded by legal proviſions, than in any other period of the Engliſh hiſtory. In particular it is worthy
[213] obſervation that the convention, in this their judgment, avoided with great wiſdom the wild extremes into which the viſionary theories of ſome zealous republicans would have led them. They held that this miſconduct of king James amounted to an *endeavour* to ſubvert the conſtitution; and not to an actual ſubverſion, or total diſſolution, of the government, according to the principles of Mr. Locke [a]: which would have reduced the ſociety almoſt to a ſtate of nature; would have levelled all diſtinctions of honour, rank, offices, and property; would have annihilated the ſovereign power, and in conſequence have repealed all poſitive laws; and would have left the people at liberty to have erected a new ſyſtem of ſtate upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a conſequent vacancy of the throne; whereby the government was allowed to ſubſiſt, though the

[z] See chap. 7. [a] on Gov. p. 3. c. 19.

executive

executive magiſtrate was gone, and the kingly office to remain, though king James was no longer king [b]. And thus the conſtitution was kept entire; which upon every ſound principle of government muſt otherwiſe have fallen to pieces, had ſo principal and conſtituent a part as the royal authority been aboliſhed, or even ſuſpended.

THIS ſingle poſtulatum, the vacancy of the throne, being once eſtabliſhed, the reſt that was then done followed almoſt of courſe. For, if the throne be at any time vacant; (which may happen by other means beſides that of abdication; as if all the blood royal ſhould fail, without any ſucceſſor appointed by parliament;) if, I ſay, a vacancy by any means whatſoever ſhould happen, the right of diſpoſing of this vacancy ſeems naturally to reſult to the lords and commons, the truſtees and repreſentatives of the nation (4). For there are no other hands in which it can ſo properly be intruſted; and there is a neceſſity of it's being intruſted ſomewhere, elſe the whole frame of government muſt be diſſolved and periſh. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in ſuch manner as they judged the moſt proper. And this was done by their declaration of 12 February 1688 [c], in the following manner: "that "William and Mary, prince and princeſs of Orange, be, "and be declared king and queen, to hold the crown and "royal dignity during their lives, and the life of the ſur- [214]

[b] Law of forfeit. 118, 119. [c] Com. Journ. 12 Feb. 1688.

(4) The preamble to the bill of rights expreſsly declares, that "the lords ſpiritual and temporal, and commons, aſſembled at Weſtminſter lawfully, fully and freely repreſent all the eſtates of the "people of this realm." The lords are not leſs the truſtees and guardians of their country, than the members of the houſe of commons. It was juſtly ſaid, when the royal prerogatives were ſuſpended during his majeſty's illneſs, "that the two houſes of "parliament were the organs by which the people expreſſed their "will."

" vivor of them; and that the ſole and full exerciſe of the " regal power be only in, and executed by, the ſaid prince " of Orange, in the names of the ſaid prince and princeſs, " during their joint lives: and after their deceaſes the ſaid " crown and royal dignity to be to the heirs of the body of " the ſaid princeſs; and for default of ſuch iſſue to the " princeſs Anne of Denmark and the heirs of her body; and " for default of ſuch iſſue to the heirs of the body of the ſaid " prince of Orange."

PERHAPS, upon the principles before eſtabliſhed, the convention might (if they pleaſed) have veſted the regal dignity in a family entirely new, and ſtrangers to the royal blood: but they were too well acquainted with the benefits of hereditary ſucceſſion, and the influence which it has by cuſtom over the minds of the people, to depart any farther from the antient line than temporary neceſſity and ſelf-preſervation required. They therefore ſettled the crown, firſt on king William and queen Mary, king James's eldeſt daughter, for their joint lives: then on the ſurvivor of them; and then on the iſſue of queen Mary: upon failure of ſuch iſſue, it was limited to the princeſs Anne, king James's ſecond daughter, and her iſſue; and laſtly, on failure of that to the iſſue of king William, who was the grandſon of Charles the firſt, and nephew as well as ſon-in-law of king James the ſecond, being the ſon of Mary his eldeſt ſiſter. This ſettlement included all the proteſtant poſterity of king Charles I, except ſuch other iſſue as king James might at any time have, which was totally omitted, through fear of a popiſh ſucceſſion. And this order of ſucceſſion took effect accordingly.

THESE three princes therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right or *deſcent*, but by way of donation or *purchaſe*, as the
[215] lawyers call it; by which they mean any method of acquiring an eſtate otherwiſe than by deſcent. The new ſettlement did not merely conſiſt in excluding king James, and the perſon pretended to be prince of Wales, and then ſuffering

ing the crown to deſcend in the old hereditary channel: for the uſual courſe of deſcent was in ſome inſtances broken through; and yet the convention ſtill kept it in their eye, and paid a great, though not total, regard to it. Let us ſee how the ſucceſſion would have ſtood, if no abdication had happened, and king James had left no other iſſue than his two daughters queen Mary and queen Anne. It would have ſtood thus: queen Mary and her iſſue; queen Anne and her iſſue; king William and his iſſue. But we may remember, that queen Mary was only nominally queen, jointly with her huſband king William, who alone had the regal power; and king William was perſonally preferred to queen Anne, though his iſſue was poſtponed to hers. Clearly therefore theſe princes were ſucceſſively in poſſeſſion of the crown by a title different from the uſual courſe of deſcent.

IT was towards the end of king William's reign, when all hopes of any ſurviving iſſue from any of theſe princes died with the duke of Glouceſter, that the king and parliament thought it neceſſary again to exert their power of limiting and appointing the ſucceſſion, in order to prevent another vacancy of the throne; which muſt have enſued upon their deaths, as no farther proviſion was made at the revolution, than for the iſſue of queen Mary, queen Anne, and king William. The parliament had previouſly by the ſtatute of 1 W. & M. ſt. 2. c. 2. enacted, that every perſon who ſhould be reconciled to, or hold communion with, the ſee of Rome, ſhould profeſs the popiſh religion, or ſhould marry a papiſt, ſhould be excluded and for ever incapable to inherit, poſſeſs, or enjoy the crown; and that in ſuch caſe the people ſhould be abſolved from their allegiance, and the crown ſhould deſcend to ſuch perſons, being proteſtants, as would have inherited the ſame, in caſe the perſon ſo reconciled, holding communion, profeſſing, or marrying, were naturally dead. To act therefore conſiſtently with themſelves, and at the ſame time pay as much regard to the old hereditary line as their former reſolutions would admit, they turned their eyes on the princeſs Sophia, electreſs and dutcheſs dowager of Hanover, [216]

the moſt accompliſhed princeſs of her age[c]. For, upon the impending extinction of the proteſtant poſterity of Charles the firſt, the old law of regal deſcent directed them to recur to the deſcendants of James the firſt; and the princeſs Sophia, being the youngeſt daughter of Elizabeth queen of Bohemia, who was the daughter of James the firſt, was the neareſt of the ancient blood royal, who was not incapacitated by profeſſing the popiſh religion. On her therefore, and the heirs of her body, being proteſtants, the remainder of the crown, expectant on the death of king William and queen Anne without iſſue, was ſettled by ſtatute 12 and 13 W. III. c. 2. And at the ſame time it was enacted, that whoſoever ſhould hereafter come to the poſſeſſion of the crown ſhould join in the communion of the church of England as by law eſtabliſhed.

THIS is the laſt limitation of the crown that has been made by parliament: and theſe ſeveral actual limitations, from the time of Henry IV to the preſent, do clearly prove the power of the king and parliament to new-model or alter the ſucceſſion. And indeed it is now again made highly penal to diſpute it: for by the ſtatute 6 Ann. c. 7. it is enacted, that if any perſon maliciouſly, adviſedly, and directly, ſhall maintain, by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the deſcent thereof, he ſhall be guilty of high treaſon; or if he maintains the ſame by only preaching, teaching, or adviſed ſpeaking, he ſhall incur the penalties of a *praemunire*.

THE princeſs Sophia dying before queen Anne, the inheritance thus limited deſcended on her ſon and heir king George the firſt; and, having on the death of the queen taken effect in his perſon, from him it deſcended to his late majeſty king George the ſecond; and from him to his grandſon and heir, our preſent gracious ſovereign, king George the third.

[c] Sandford in his genealogical hiſtory, publiſhed *A. D.* 1677, ſpeaking (page 531) of the princeſſes Elizabeth, Louiſa, and Sophia, daughters of the queen of Bohemia, ſays, the firſt was reputed the moſt learned, the ſecond the greateſt artiſt, and the laſt one of the moſt accompliſhed ladies in Europe.

HENCE

HENCE it is eaſy to collect, that the title to the crown is at preſent hereditary, though not quite ſo abſolutely hereditary as formerly: and the common ſtock or anceſtor, from whom the deſcent muſt be derived, is alſo different. Formerly the common ſtock was king Egbert; then William the conqueror; afterwards in James the firſt's time the two common ſtocks united, and ſo continued till the vacancy of the throne in 1688: now it is the princeſs Sophia, in whom the inheritance was veſted by the new king and parliament. Formerly the deſcent was abſolute, and the crown went to the next heir without any reſtriction: but now, upon the new ſettlement, the inheritance is conditional; being limited to ſuch heirs only, of the body of the princeſs Sophia, as are proteſtant members of the church of England, and are married to none but proteſtants.

AND in this due medium conſiſts, I apprehend, the true conſtitutional notion of the right of ſucceſſion to the imperial crown of theſe kingdoms. The extremes, between which it ſteers, are each of them equally deſtructive of thoſe ends for which ſocieties were formed and are kept on foot. Where the magiſtrate, upon every ſucceſſion, is elected by the people, and may by the expreſs proviſion of the laws be depoſed (if not puniſhed) by his ſubjects, this may ſound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeaſible hereditary right, when coupled with the doctrine of unlimited paſſive obedience, is ſurely of all conſtitutions the moſt thoroughly ſlaviſh and dreadful. But when ſuch an hereditary right, as our laws have created and veſted in the royal ſtock, is cloſely interwoven with thoſe liberties, which, we have ſeen in a former chapter, are equally the inheritance of the ſubject; this union will form a conſtitution, in theory the moſt beautiful of any, in practice the moſt approved, and, I truſt, in duration the moſt permanent. It was the duty of an expounder of our laws to lay this conſtitution before the ſtudent in it's true and genuine light: it is the duty of every good Engliſhman to underſtand, to revere, to defend it.

CHAPTER THE FOURTH.

OF THE KING'S ROYAL FAMILY.

THE firſt and moſt conſiderable branch of the king's royal family, regarded by the laws of England, is the queen.

THE queen of England is either queen *regent*, queen *conſort*, or queen *dowager*. The queen *regent*, *regnant*, or *ſovereign*, is ſhe who holds the crown in her own right; as the firſt (and perhaps the ſecond) queen Mary, queen Elizabeth, and queen Anne; and ſuch a one has the ſame powers, prerogatives, rights, dignities, and duties, as if ſhe had been a king. This was obſerved in the entrance of the laſt chapter, and is expreſsly declared by ſtatute 1 Mar. I. ſt. 3 c. 1.(1). But the queen *conſort* is the wife of the reigning king; and ſhe, by virtue of her marriage, is participant of divers prerogatives above other women[a].

[a] Finch. L. 86.

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(1) Mary being the firſt queen that had ſat upon the Engliſh throne, this ſtatute was paſſed, as it declares, for "the extinguiſhment of the doubt and folly of malicious and ignorant perſons," who might be induced to think that a queen could not exerciſe all the prerogatives of a king.

AND,

AND, firſt, ſhe is a public perſon, exempt and diſtinct from the king; and not, like other married women, ſo cloſely connected as to have loſt all legal or ſeparate exiſtence ſo long as the marriage continues. For the queen is of ability to purchaſe lands, and to convey them, to make leaſes, to grant copyholds, and do other acts of ownerſhip, without the concurrence of her lord; which no other married woman can do[b]: a privilege as old as the Saxon aera[c]. She is alſo capable of taking a grant from the king, which no other wife is from her huſband; and in this particular ſhe agrees with the *Auguſta*, or *piiſſima regina conjux divi imperatoris* of the Roman laws; who, according to Juſtinian[d], was equally capable of making a grant to, and receiving one from, the emperor. The queen of England hath ſeparate courts and offices diſtinct from the king's, not only in matters of ceremony, but even of law; and her attorney and ſolicitor general are entitled to a place within the bar of his majeſty's courts, together with the king's counſel[e]. She may likewiſe ſue and be ſued alone, without joining her huſband. She may alſo have a ſeparate property in goods as well as lands, and has a right to diſpoſe of them by will. In ſhort, ſhe is in all legal proceedings looked upon as a feme ſole, and not as a feme covert; as a ſingle, not as a married woman[f]. For which the reaſon given by ſir Edward Coke is this: becauſe the wiſdom of the common law would not have the king (whoſe continual care and ſtudy is for the public, and *circa ardua regni*) to be troubled and diſquieted on account of his wife's domeſtic affairs; and therefore it veſts in the queen a power of tranſacting her own concerns, without the intervention of the king, as if ſhe was an unmarried woman. [219]

THE queen hath alſo many exemptions, and minute prerogatives. For inſtance: ſhe pays no toll[g]; nor is ſhe liable to any amercement in any court[h]. But in general, un-

[b] 4 Rep. 23.
[c] Seld. *Jan. Angl.* 1. 42.
[d] *Cod.* 5. 16. 26.
[e] Seld. tit. hon. 1. 6. 7.
[f] Finch. L. 86. Co. Litt. 133.
[g] Co. Litt. 133.
[h] Finch. L. 185.

leſs

leſs where the law has expreſsly declared her exempted, ſhe is upon the ſame footing with other ſubjects; being to all intents and purpoſes the king's ſubject, and not his equal: in like manner as, in the imperial law, "*Auguſta legibus ſoluta* "*non eſt*[1]."

THE queen hath alſo ſome pecuniary advantages, which form her a diſtinct revenue: as, in the firſt place, ſhe is entitled to an antient perquiſite called queen-gold, or *aurum reginae*; which is a royal revenue, belonging to every queen conſort during her marriage with the king, and due from every perſon who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in conſideration of any privileges, grants, licences, pardons, or
[220] other matter of royal favour conferred upon him by the king: and it is due in the proportion of one tenth part more, over and above the entire offering or fine made to the king; and becomes an actual debt of record to the queen's majeſty by the mere recording of the fine[k]. As, if an hundred marks of ſilver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chaſe, or free-warren: there the queen is entitled to ten marks in ſilver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginae*[l]. But no ſuch payment is due for any aids or ſubſidies granted to the king in parliament or convocation; nor for fines impoſed by courts on offenders, againſt their will; nor for voluntary preſents to the king, without any conſideration moving from him to the ſubject; nor for any ſale or contract whereby the preſent revenues or poſſeſſions of the crown are granted away or diminiſhed[m].

THE original revenue of our antient queens, before and ſoon after the conqueſt, ſeems to have conſiſted in certain reſervations or rents out of the demeſne lands of the crown,

[1] *Ff.* 1. 3. 31.
[k] Pryn. *Aur. Reg.* 2.
[l] 12 Rep. 21. 4 Inſt. 358.
[m] *Ibid.* Pryn. 6. Madox. hiſt. exch. 242.

which

which were expreſsly appropriated to her majeſty, diſtinct from the king. It is frequent in doomſday book, after ſpecifying the rent due to the crown, to add likewiſe the quantity of gold or other renders reſerved to the queen [n]. Theſe were frequently appropriated to particular purpoſes; to buy wool for her majeſty's uſe [o], to purchaſe oil for her lamps [p], or to furniſh her attire from head to foot [q], which was frequently very coſtly, as one ſingle robe in the fifth year of Henry II ſtood the city of London in upwards of fourſcore pounds [r]. [221] A practice ſomewhat ſimilar to that of the eaſtern countries, where whole cities and provinces were ſpecifically aſſigned to purchaſe particular parts of the queen's apparel [s]. And, for a farther addition to her income, this duty of queen-gold is ſuppoſed to have been originally granted; thoſe matters of grace and favour, out of which it aroſe, being frequently obtained from the crown by the powerful interceſſion of the queen. There are traces of it's payment, though obſcure ones, in the book of doomſday and in the great pipe-roll of Henry the firſt [t]. In the reign of Henry the ſecond the manner of collecting it appears to have been well underſtood, and it forms a diſtinct head in the antient dialogue of the exchequer [u] written in the time of that prince, and uſually attributed to Gervaſe of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen conſorts of England till the death of Henry VIII; though after the acceſſion of the Tudor family the collecting of it ſeems

[n] *Bedefordſcire Maner. Leſtone redd. per annum xxii lib. &c.; ad opus reginae ii uncias auri.——Hereford ſcire. In Lene, &c. conſuetud. ut praepoſitus manerii veniente domina ſua (regina) in maner. praeſentaret ei xviii oras denar. ut eſſet ipſa laeto animo.* Pryn. Append. to *Aur. Reg.* 2, 3.

[o] *Cauſa coadunandi lanam reginae.* Domeſd. *ibid.*

[p] *Civitas Lundon. Pro oleo ad lamp. ad reginae. (Mag. rot. pip. temp. Hen. II. ibid.)*

[q] *Vicecomes Berkeſcire, xvi l. pro cappa reginae. (Mag. rot. pip. 19—22 Hen. II. ibid.) Civitas Lund. cordubanario reginae xx s. (Mag. rot. 2 Hen. II.* Madox hiſt. exch. 419.)

[r] *Pro roba ad opus reginae, quater xx l. & vi s. viii d. (Mag. rot. 5 Hen. II. ibid.* 250.)

[s] *Solere aiunt barbaros reges Perſarum ac Syrorum—uxoribus civitates attribuere, hoc modo; hae civitas mulieri redimiculum praebeat, haec in collum, haec in crines, &c. (Cic. in Verrem, lib. 3. cap.* 33.)

[t] See Madox *Diſceptat. epiſtolar.* 74. Pryn. *Aur. Reg.* Append. 5.

[u] *lib. 2. c. 26.*

to have been much neglected: and, there being no queen conſort afterwards till the acceſſion of James I, a period of near ſixty years, it's very nature and quantity became then a matter of doubt: and being referred by the king to the chief juſtices and chief baron, their report of it was ſo very unfavourable[u], that his conſort queen Anne (though ſhe claimed it) yet never thought proper to exact it. In 1635, 11 Car. I, a time fertile of expedients for raiſing money upon dormant precedents in our old records (of which ſhip-money was a fatal inſtance) the king, at the petition of his queen, Henrietta Maria, iſſued out his writ[w] for levying it: but afterwards purchaſed it of his conſort at the price of ten thouſand pounds; finding it, perhaps, too trifling and troubleſome to levy. And when afterwards, at the reſtoration, by
[222] the abolition of the military tenures, and the fines that were conſequent upon them, the little that legally remained of this revenue was reduced to almoſt nothing at all, in vain did Mr. Prynne, by a treatiſe which does honour to his abilities as a painful and judicious antiquary, endeavour to excite queen Catherine to revive this antiquated claim.

ANOTHER antient perquiſite belonging to the queen conſort, mentioned by all our old writers[x], and, therefore only, worth notice, is this; that on the taking of a whale on the coaſts, which is a royal fiſh, it ſhall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "*De ſturgione obſervetur, "quod rex illum habebit integrum: de balena vero ſufficit, ſi "rex habeat caput, et regina caudam.*" The reaſon of this whimſical diviſion, as aſſigned by our antient records[y], was to furniſh the queen's wardrobe with whalebone (2).

[u] Mr. Prynne, with ſome appearance of reaſon, inſinuates, that their reſearches were very ſuperficial. (*Aur. Reg.* 125.)

[w] 19 Rym. *Fœd.* 721.

[x] Bracton. *l.* 3. *c.* 3. Britton. *c.* 17. Flet. *l.* 1. *c.* 45 & 46.

[y] Pryn. *Aur. Reg.* 127.

(2) The reaſon is more whimſical than the diviſion, for the whalebone lies entirely in the head.

BUT

BUT farther: though the queen is in all reſpects a ſubject, yet, in point of the ſecurity of her life and perſon, ſhe is put on the ſame footing with the king. It is equally treaſon (by the ſtatute 25 Edw. III) to compaſs or imagine the death of our lady the king's companion, as of the king himſelf: and to violate, or defile the queen conſort, amounts to the ſame high crime; as well in the perſon committing the fact, as in the queen herſelf, if conſenting. A law of Henry the eighth[z] made it treaſon alſo for any woman, who was not a virgin, to marry the king without informing him thereof: but this law was ſoon after repealed(3), it treſpaſſing too ſtrongly, as well on natural juſtice, as female modeſty. If however the queen be accuſed of any ſpecies of treaſon, ſhe ſhall (whether conſort or dowager) be tried by the peers of parliament, as queen Ann Boleyn was in 28 Hen. VIII (4).

THE huſband of a queen regnant, as prince George of Denmark was to queen Anne, is her ſubject; and may be guilty of high treaſon againſt her: but, in the inſtance of

[z] Stat. 33 Hen. VIII. c. 21.

(3) This was a clauſe in the act, which attainted queen Catharine Howard and her accomplices for her incontinence; but it was not repealed till the 1 Ed. VI. c. 12. which abrogated all treaſons created ſince the memorable ſtatute in the 25 Ed. III.

(4) Ann Boleyn was convicted of high treaſon in the court of the lord high-ſteward. One of the charges againſt this unhappy queen was, that ſhe had ſaid, "that the king never had had her "heart;" a declaration, if made, in which there was probably more truth than diſcretion; but this was adjudged to be a ſlander of her own iſſue, and therefore high treaſon, according to a ſtatute which had been paſſed about two years before for her honour and protection. *Harg. St. Tr.* 11 vol. p. 10.

Articles of impeachment were prepared againſt queen Catharine Parr for hereſy, in preſuming to controvert the theological doctrines of the king; but by her dexterity and addreſs, ſhe baffled the deſigns of her enemies, and regained the affections of that capricious monarch. 4 *Hume*, 259.

Articles of impeachment for high treaſon were exhibited againſt Henrietta queen of Car. I. from which ſhe ſaved herſelf by an eſcape to France. 7 *Hume*, 10.

conjugal infidelity, he is not ſubjected to the ſame penal re-
[223] ſtrictions. For which the reaſon ſeems to be, that, if a queen conſort is unfaithful to the royal bed, this may debaſe or baſtardiſe the heirs to the crown; but no ſuch danger can be conſequent on the infidelity of the huſband to a queen regnant.

A QUEEN *dowager* is the widow of the king, and as ſuch enjoys moſt of the privileges belonging to her as queen conſort. But it is not high treaſon to conſpire her death, or to violate her chaſtity, for the ſame reaſon as was before alleged, becauſe the ſucceſſion to the crown is not thereby endangered. Yet ſtill, *pro dignitate regali*, no man can marry a queen dowager without ſpecial licence from the king, on pain of forfeiting his lands and goods. This ſir Edward Coke [a] tells us was enacted in parliament in 6 Hen. VI, though the ſtatute be not in print (5). But ſhe, though an alien born, ſhall ſtill be entitled to dower after the king's demiſe, which no other alien is [b]. A queen dowager, when married again to a ſubject, doth not loſe her regal dignity, as peereſſes dowager do their peerage when they marry commoners. For Catherine, queen dowager of Henry V, though ſhe married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor; yet, by the name of Catherine queen of England, maintained an action againſt the biſhop of Carliſle. And ſo, the queen dowager of Navarre marrying with Edmond earl of Lancaſter, brother to king Edward the firſt, maintained an action of dower (after the death of her ſecond huſband) by the name of queen of Navarre [c].

THE prince of Wales, or heir apparent to the crown, and alſo his royal conſort, and the princeſs royal, or eldeſt daughter of the king, are likewiſe peculiarly regarded by the laws. For, by ſtatute 25 Edw. III, to compaſs or conſpire the

[a] 2 Inſt. 18. See Riley's Plac. Parl. 72.
[b] Co. Litt. 31.
[c] 2 Inſt. 50.

(5) Mr. Hargrave, in a note to Co. Litt. 133. ſays, that no ſuch ſtatute can be found. Lord Coke there refers to it by 8 Hen. VI. n° 7. in 2 Inſt. 18. by 6 Hen. VI. n° 41. In Riley's Plac. Parl. it is called 2 Hen. VI.

death,

death of the former, or to violate the chaſtity of either of the latter, are as much high treaſon as to conſpire the death of the king, or violate the chaſtity of the queen. And this upon the ſame reaſon, as was before given; becauſe the prince of Wales is next in ſucceſſion to the crown, and to violate his wife might taint the blood royal with baſtardy: and the eldeſt daughter of the king is alſo alone inheritable to the crown, on failure of iſſue male, and therefore more reſpected [224] by the laws than any of her younger ſiſters (6); inſomuch that upon this, united with other (feodal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldeſt daughter, and her only. The heir apparent (7) to the crown is uſually made prince of Wales and earl of Cheſter (8), by ſpecial creation, and inveſti-

(6) This ſtatute perhaps was not meant to be extended to the princeſs royal when ſhe had younger brothers living, for the iſſue of their wives muſt inherit the crown before the iſſue of the princeſs royal, yet their chaſtity is not protected by the ſtatute.

(7) This creation has not been confined to the heir apparent, for both queen Mary and queen Elizabeth were created by their father Hen. VIII. princeſſes of Wales, each of them at the time (the latter after the illegitimation of Mary) being heir preſumptive to the crown. 4 *Hume*, 113.

Edward II. was the firſt prince of Wales. When his father had ſubdued the kingdom of Wales, he promiſed the people of that country, upon condition of their ſubmiſſion, to give them a prince who had been born among them, and who could ſpeak no other language.

Upon their acquieſcence with this deceitful offer, he conferred the principality of Wales upon his ſecond ſon Edward, then an infant. Edward, by the death of his eldeſt brother Alfonſo, became heir to the crown, and from that time, this honour has been appropriated only to the eldeſt ſons or eldeſt daughters of the kings of England. 2 *Hume*, 243.

(8) Selden tells us, "that the earldom of Cheſter was once alſo "a principality, erected into that title by parliament in 21 Rich. "II, wherein it was alſo ordained that it ſhould be given to the "king's eldeſt ſon. But that whole parliament was repealed in the "firſt of Hen. IV, although the earldom hath uſually been ſince "given with the principality of Wales." *Seld. Tit. of Hon. 2. c. 5. ſ. 1.*

ture (9); but being the king's eldeſt ſon (10), he is by inheritance duke of Cornwall, without any new creation [d].

[d] 8 Rep. 1. Seld. tit. of hon. 2. 5.

(9) That is, by letters patent under the great ſeal of England.

(10) Lord Coke, in the Prince's caſe, in the 8th Report, has expreſsly advanced, that the duchy of Cornwall cannot deſcend, upon the death of the king's firſt-born ſon, to the eldeſt then living. But this poſition is beyond all controverſy erroneous. Lord Hardwicke, in Lomax *v.* Holmden, 1 Veſ. 294. has obſerved, "That "the eldeſt ſon of the king of England takes the duchy of Corn-"wall as *primogenitus*; although lord Coke at the end of the "Prince's caſe ſays otherwiſe. But this was not the point there, "being only an obſervation of his own, and has ever ſince been "held a miſtake of that great man. He was alſo miſtaken in the "fact, in ſaying that Henry VIII. was not duke of Cornwall, "becauſe not *primogenitus*; for lord Bacon in his hiſtory of "Henry VII. affirms the contrary, that the dukedom devolved "to him upon the death of Arthur; and this is by a great law-"yer, and who muſt have looked into it, as he was then attorney "or ſolicitor general." But this point was ſolemnly determined in 1613, upon the death of prince Henry the eldeſt ſon of James I. in the caſe of the duchy of Cornwall, the report of which is inſerted at length in Collins's Proceedings on Baronies, p. 148. In which it was reſolved that prince Charles, the king's ſecond ſon, was duke of Cornwall by inheritance.

It is more ſtrange that lord Coke ſhould have fallen into this miſtake, as the contrary appears from almoſt every record upon the ſubject.

In the 5th Henry IV. the ſecond reign after the creation of the duchy, there is a record, in which prince Henry makes a grant of part of the duchy lands to the counteſs of Huntingdon, and the record ſtates, that becauſe the prince is within age, ſo that in law his grant is not effectual to give a ſure eſtate, he ſhall pledge his faith before the king and all the lords of parliament, that when he attains his full age, he ſhall grant a ſure eſtate againſt himſelf and his heirs; and that his three brothers, Thomas, John, and Humphrey, ſhall in like manner pledge their faith to confirm the ſame eſtate, *ſi iſſint aveigne, que Dieux defende, que le dit Duche unques devient en lours mains*, if it ſhould ſo happen, which God forbid, that the ſaid duchy ſhould ever come into their hands, and thereupon they

THE reſt of the royal family may be conſidered in two different lights, according to the different ſenſes in which the term, *royal family*, is uſed. The larger ſenſe includes all thoſe, who are by any poſſibility inheritable to the crown. Such, before the revolution, were all the deſcendants of William the conqueror; who had branched into an amazing extent, by intermarriages with the antient nobility. Since the revolution and act of ſettlement, it means the proteſtant iſſue of the princeſs Sophia; now comparatively few in num-

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they all made a promiſe and oath to that effect. Rot. Parl. 5 Hen. IV. No. 4.

But the ſecond ſon would not ſucceed to the dukedom, if his elder brother left iſſue; in that caſe it would revert to the crown. The duke of Cornwall muſt be both the king's eldeſt ſon and heir apparent to the crown; this appears from a great variety of records, *que les fitz eiſnes des rois d'Engleterre, c'eſt aſſavoir, ceux qui ſerroient heirs proſcheins du roialme d'Engleterre, fuiſſent ducs de Cornewaile.* Rot. Parl. 9 Hen. V. No. 20.

In a charter of livery of the duchy by Ed. IV. to his eldeſt ſon prince Edward, recited in the rolls of parliament, the following ſentence is part of the preamble: *Filii primogeniti regum Angliæ primo nativitatis ſuæ die majoris atque perfectæ præſumuntur ætatis, ſic quod liberationem dicti ducatûs eo tunc à nobis petere valeant atque de jure obtinere debeant ac ſi viginti et unius annorum ætatis plenæ fuiſſent.* Rot. Parl. 12 Ed. IV. No. 14. From this and from other authorities it follows, that a duke of Cornwall is born of full age, or is ſubject to no minority with reſpect to his enjoyment of the poſſeſſions annexed to the dukedom.

This is a ſtrange ſpecies of inheritance, and perhaps is the only mode of deſcent which depends upon the authority of a ſtatute. In the Prince's caſe, reported by lord Coke, the queſtion was, whether the original grant to Edward the Black Prince, who was created in the 11th of Ed. III. duke of Cornwall, and who was the firſt duke in England after the duke of Normandy, had the authority of parliament, or was an honour conferred by the king's charter alone? If the latter, the limitation would have been void, as nothing leſs than the power of parliament can alter the eſtabliſhed rules of deſcent. But notwithſtanding it is in the form of a charter, it was held to be an act of the legiſlature. It concludes, *per ipſum regem et totum concilium in parliamento.*

ber, but which in proceſs of time may poſſibly be as largely diffuſed. The more confined ſenſe includes only thoſe, who are within a certain degree of propinquity to the reigning prince, and to whom therefore the law pays an extraordinary regard and reſpect: but, after that degree is paſt, they fall into the rank of ordinary ſubjects, and are ſeldom conſidered any farther, unleſs called to the ſucceſſion upon failure of the nearer lines. For, though collateral conſanguinity is regarded indefinitely, with reſpect to inheritance or ſucceſſion, yet it is and can only be regarded within ſome certain limits in any other reſpect, by the natural conſtitution of things and the dictates of poſitive law [e].

THE younger ſons and daughters of the king, and other branches of the royal family, who are not in the immediate line of ſucceſſion, were therefore little farther regarded by the antient law, than to give them to a certain degree precedence before all peers and public officers, as well eccleſiaſtical as temporal. This is done by the ſtatute 31 Hen. VIII. c. 10.
[225] which enacts, that no perſon, except the king's children, ſhall preſume to ſit or have place at the ſide of the cloth of eſtate in the parliament chamber; and that certain great officers therein named ſhall have precedence above all dukes, except only ſuch as ſhall happen to be the king's ſon, brother, uncle, nephew (which ſir Edward Coke [f] explains to ſignify grandſon or *nepos*) or brother's or ſiſter's ſon. Therefore, after theſe degrees are paſt, peers or others of the *blood royal* are entitled to no place or precedence except what belongs to them by their perſonal rank or dignity. Which made ſir Edward Walker complain [g], that by the haſty creation of prince Rupert to be duke of Cumberland, and of the earl of Lenox to be duke of that name, previous to the creation of king Charles's ſecond ſon, James, to be duke of York, it might happen that their grandſons would have precedence of the grandſons of the duke of York.

INDEED, under the deſcription of the king's *children* his *grandſons* are held to be included, without having recourſe to ſir Ed-

[e] See *eſſay on collateral conſanguinity*, in Law-tracts, 4to. *Oxon.* 1771.

[f] 4 Inſt. 362.

[g] Tract. p. 301.

ward

ward Coke's interpretation of *nephew:* and therefore when his late majeſty king George II created his grandſon Edward, the ſecond ſon of Frederick prince of Wales deceaſed, duke of York, and referred it to the houſe of lords to ſettle his place and precedence, they certified [h] that he ought to have place next to the late duke of Cumberland the then king's youngeſt ſon; and that he might have a ſeat on the left hand of the cloth of eſtate. But when, on the acceſſion of his preſent majeſty, thoſe royal perſonages ceaſed to take place as the *children*, and ranked only as the *brother* and *uncle*, of the king, they alſo left their ſeats on the ſide of the cloth of eſtate: ſo that when the duke of Glouceſter, his majeſty's ſecond brother, took his ſeat in the houſe of peers [i], he was placed on the upper end of the earl's bench (on which the dukes uſually ſit) next to his royal highneſs the duke of York. And in 1718, upon a queſtion referred to all the judges by king George I, it was reſolved by the opinion of ten againſt the other two, that the education and care of all the king's grandchildren while minors, did belong of right to his majeſty as king of this realm, even during their father's life [k] (11). But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion [l], that this care and approbation extend alſo to the preſumptive heir of the crown; though to what other branches of the royal family the ſame did extend they did not find preciſely determined. The moſt frequent inſtances of the crown's interpoſition go no far- [226]
ther than nephews and neices [m]; but examples are not want-

h Lords' Journ. 24 Apr. 1760.
i *Ibid.* 10 Jan. 1765.
k Forteſc. Al. 401—440.
l Lords' Journ. 23 Feb. 1772.
m See (beſides the inſtances cited in Forteſcue Aland) for *brothers* and *ſiſters*; under king Edward III, 4 Rym. 392. 403. 411. 501. 508. 512. 549. 683:—under Henry V, 9 Rym. 710, 711. 741:—under Edward IV, 11 Rym. 564, 565. 570. 601:—under Henry VIII, 13 Rym. 249. 423:—under Edw. VI, 7 St. Tr. 3. 8.

(11) The authorities and arguments of the two diſſenting judges, Price and Eyre, are ſo full and cogent, that if this queſtion had ariſen before the judges were independent of the crown, one would have been inclined to have ſuſpected the ſincerity of the other ten, and the authority of the deciſion. See *Harg. St. Tr.* 11 vol. 295.

ing of it's reaching to more diſtant collaterals[n]. And the ſtatute 6 Henry VI before-mentioned, which prohibits the marriage of a queen dowager without the conſent of the king, aſſigns this reaſon for it (12): "becauſe the diſparagement of "the queen ſhall give greater comfort and example to other "ladies of eſtate, who are of the *blood royal*, more lightly to "diſparage themſelves[o]." Therefore by the ſtatute 28 Hen. VIII. c. 18. (repealed, among other ſtatutes of treaſons, by 1 Edw. VI. c. 12.) it was made high treaſon for any man to contract marriage with the king's children or reputed children, his ſiſters or aunts *ex parte paterna*, or the children of his brethren or ſiſters; being exactly the ſame degrees, to which precedence is allowed by the ſtatute 31 Hen. VIII. beforementioned. And now, by ſtatute 12 Geo. III. c. 11. no deſcendant of the body of king George II, (other than the iſſue of princeſſes married into foreign families) is capable of contracting matrimony, without the previous conſent of the king ſignified under the great ſeal; and any marriage contracted without ſuch conſent is void. Provided, that ſuch of the ſaid deſcendants, as are above the age of twenty-five, may after a twelvemonth's notice given to the king's privy council, contract and ſolemnize marriage without the conſent of the crown; unleſs both houſes of parliament ſhall, before the expiration of the ſaid year, expreſsly declare their diſapprobation of ſuch intended marriage. And all perſons ſolemnizing, aſſiſting, or being preſent at, any ſuch prohibited marriage, ſhall incur the penalties of the ſtatute of *praemunire*.

3. 8. For *nephews* and *nieces*; under Henry III, 1 Rym. 852:—under Edward I, 2 Rym 489:—under Edward III, 5 Rym. 561:—under Richard II, 7 Rym. 264:——under Richard III, 12 Rym. 232. 244:——under Henry VIII, 15 Rym. 26. 31.

[n] To *great nieces*; under Edward II, 3 Rym. 575. 644. To *firſt couſins*; under Edward III, 5 Rym. 177. To *ſecond* and *third couſins*; under Edward III, 5 Rym. 729:——under Richard II, 7 Rym. 225:——under Henry VI, 10 Rym. 322:——under Henry VII, 12 Rym. 529:——under queen Elizabeth, Camd. Ann. A. D. 1562. To *fourth couſins*; under Henry VII, 12 Rym. 329. To the *blood-royal* in general; under Richard II, 7 Rym. 787.

[o] Ril. plac. parl. 672.

(12) The occaſion of this ſtatute was the marriage of Catharine, mother to Hen. VI, with Owen Tudor, a private gentleman, See p. 223.

CHAPTER THE FIFTH.

OF THE COUNCILS BELONGING TO THE KING.

THE third point of view, in which we are to conſider the king, is with regard to his councils. For, in order to aſſiſt him in the diſcharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath aſſigned him a diverſity of councils to adviſe with.

1. THE firſt of theſe is the high court of parliament, whereof we have already treated at large.

2. SECONDLY, the peers of the realm are by their birth hereditary counſellors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal uſe, when there is no parliament in being [a]. Accordingly Bracton [b], ſpeaking of the nobility of his time, ſays they might probably be called "*conſules, a conſulendo; reges enim tales ſibi aſſociant ad conſulendum.*" And in our law books [c] it is laid down, that peers are created for two reaſons: 1. *Ad conſulendum*, 2. *Ad defendendum, regem:* on which account the law gives them certain great and high privileges: ſuch as freedom from arreſts, *&c.* even when no parliament is ſitting: becauſe it intends, that they are always aſſiſting the king with their counſel for the commonwealth, or keeping the realm in ſafety by their proweſs and valour.

[a] Co. Litt. 110.
[b] *l.* 1. *c.* 8.
[c] 7 Rep. 34. 9 Rep. 49. 12 Rep. 96.

INSTANCES

INSTANCES of conventions of the peers, to adviſe the king, have been in former times very frequent; though now fallen into diſuſe, by reaſon of the more regular meetings of parliament. Sir Edward Coke[d] gives us an extract of a record, 5 Hen. IV, concerning an exchange of lands between the king and the earl of Northumberland, wherein the value of each was agreed to be ſettled by advice of parliament, (if any ſhould be called before the feaſt of ſaint Lucia,) or otherwiſe by advice of the grand council of peers which the king promiſes to aſſemble before the ſaid feaſt, in caſe no parliament ſhall be called. Many other inſtances of this kind of meeting are to be found under our antient kings: though the formal method of convoking them had been ſo long left off, that when king Charles I in 1640 iſſued out writs under the great ſeal to call a great council of all the peers of England to meet and attend his majeſty at York, previous to the meeting of the long parliament, the earl of Clarendon[e] mentions it as a new invention, not before heard of; that is, as he explains himſelf, ſo old, that it had not been practiſed in ſome hundreds of years. But, though there had not ſo long before been an inſtance, nor has there been any ſince, of aſſembling them in ſo ſolemn a manner, yet, in caſes of emergency, our princes have at ſeveral times thought proper to call for and conſult as many of the nobility as could eaſily be got together: as was particularly the caſe with king James the ſecond, after the landing of the prince of Orange; and with the prince of Orange himſelf, before he called that convention parliament, which afterwards called him to the throne.

BESIDES this general meeting, it is uſually looked upon to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him, with decency and reſpect, ſuch matters as he ſhall judge of importance to the public weal. And therefore, in the reign of Edward II, it was made an article of impeachment in parliament againſt

[d] 2 Inſt. 110. [e] Hiſt. b. 2.

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the two Hugh Spencers, father and ſon, for which they were baniſhed the kingdom, "that they by their evil covin would "not ſuffer the great men of the realm, the king's good "counſellors, to ſpeak with the king, or to come near him; "but only in the preſence and hearing of the ſaid Hugh the "father and Hugh the ſon, or one of them, and at their "will, and according to ſuch things as pleaſed them[f]."

3. A THIRD council belonging the king, are, according to ſir Edward Coke[g], his judges of the courts of law, for law matters. And this appears frequently in our ſtatutes, particularly 14 Edw. III. c. 5. and in other books of law. So that when the king's council is mentioned generally, it muſt be defined, particularized, and underſtood, *ſecundum ſubjectam materiam:* and, if the ſubject be of a legal nature, then by the king's council is underſtood his council for matters of law: namely, his judges. Therefore when by ſtatute 16 Ric. II. c. 5. it was made a high offence to import into this kingdom any papal bulles, or other proceſſes from Rome; and it was enacted, that the offenders ſhould be attached by their bodies, and brought before the king and his *council* to anſwer for ſuch offence; here, by the expreſſion of the king's *council*, were underſtood the king's judges of his courts of juſtice, the ſubject matter being legal: this being the general way of interpreting the word, *council*[h].

4. BUT the principal council belonging to the king is his privy council, which is generally called, by way of eminence, *the council.* And this, according to ſir Edward Coke's deſcription of it[i], is a noble, honourable, and reverend aſſembly, of the king and ſuch as he wills to be of his privy council, in the king's court or palace. The king's will is the ſole conſtituent of a privy counſellor; and this alſo regulates their number, which of antient time was twelve or thereabouts. Afterwards it increaſed to ſo large a number, that it was found inconvenient for ſecreſy and diſpatch; and therefore king Charles the ſecond in 1679 limited it to thirty: [230]

[f] 4 Inſt. 53.
[g] 1 Inſt. 110.
[h] 3 Inſt. 125.
[i] 4 Inſt. 53.

whereof

whereof fifteen were to be the principal officers of ſtate, and thoſe to be counſellors, *virtute officii*; and the other fifteen were compoſed of ten lords and five commoners of the king's chooſing [k]. But ſince that time the number has been much augmented, and now continues indefinite (1). At the ſame time alſo the antient office of lord preſident of the council was revived in the perſon of Anthony earl of Shaftſbury(2); an officer, that by the ſtatute of 31 Hen. VIII. c. 10. has precedence next after the lord chancellor and lord treaſurer.

PRIVY counſellors are *made* by the king's nomination, without either patent or grant; and, on taking the neceſſary oaths, they become immediately privy counſellors during the life of the king that chooſes them, but ſubject to removal at his diſcretion.

As to the *qualifications* of members to ſit at this board: any natural born ſubject of England is capable of being a member of the privy council; taking the proper oaths for ſecurity of the government, and the teſt for ſecurity of the church.

[k] Temple's Mem. part 3.

(1) No inconvenience ariſes from the extenſion of their numbers, as thoſe only attend who are ſpecially ſummoned for that particular occaſion upon which their advice and aſſiſtance are required. The cabinet council, as it is called, conſiſts of thoſe miniſters of ſtate who are more immediately honoured with his majeſty's confidence, and who are ſummoned to conſult upon the important and arduous diſcharge of the executive authority: their number and ſelection depend only upon the king's pleaſure; and each member of that council receives a ſummons or meſſage for every attendance.

(2) It appears from the 4 Inſt. 55. that this office exiſted in the time of Ja. I; for lord Coke ſays, there is, and of antient time hath been, a preſident of the council. This office was never granted but by letters patent under the great ſeal *durante beneplacito*, and is very ancient; for John biſhop of Norwich was preſident of the council in *anno 7 regis Johannis*. *Dormivit tamen hoc officium regnante magnâ Elizabethâ.*

But, in order to prevent any perſons under foreign attachments from inſinuating themſelves into this important truſt, as happened in the reign of king William in many inſtances, it is enacted by the act of ſettlement[l], that no perſon born out of the dominions of the crown of England, unleſs born of Engliſh parents, even though naturalized by parliament, ſhall be capable of being of the privy council.

THE *duty* of a privy counſellor appears from the oath of office[m], which conſiſts of ſeven articles: 1. To adviſe the king according to the beſt of his cunning and diſcretion. 2. To adviſe for the king's honour and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counſel ſecret. 4. To avoid corruption. 5. To help and ſtrengthen the execution of what ſhall be there reſolved. 6. To withſtand all perſons who [231] would attempt the contrary. And laſtly, in general, 7. To obſerve, keep, and do all that a good and true counſellor ought to do to his ſovereign lord.

THE *power* of the privy council is to inquire into all offences againſt the government, and to commit the offenders to ſafe cuſtody, in order to take their trial in ſome of the courts of law. But their juriſdiction herein is only to inquire, and not to puniſh: and the perſons committed by them are intitled to their *habeas corpus* by ſtatute 16 Car. I. c. 10. as much as if committed by an ordinary juſtice of the peace. And, by the ſame ſtatute, the court of ſtarchamber, and the court of requeſts, both of which conſiſted of privy counſellors, were diſſolved; and it was declared illegal for them to take cognizance of any matter of property, belonging to the ſubjects of this kingdom. But, in plantation or admiralty cauſes, which ariſe out of the juriſdiction of this kingdom; and in matters of lunacy or idiocy[n], being a ſpecial flower of the prerogative; with regard to theſe, although they may eventually involve queſtions of extenſive property,

[l] Stat. 12 & 13 Will. III. c. 2.
[m] 4 Inſt. 54.
[n] 3 P. Wms. 108.

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the privy council continues to have cognizance, being the court of appeal in ſuch caſes: or, rather, the appeal lies to the king's majeſty himſelf in council (3). Whenever alſo a queſtion ariſes between two provinces in America or elſewhere, as concerning the extent of their charters and the like, the king in his council exerciſes *original* juriſdiction therein, upon the principles of feodal ſovereignty. And ſo likewiſe when any perſon claims an iſland or a province, in the nature of a feodal principality, by grant from the king or his anceſtors, the determination of that right belongs to his majeſty in council: as was the caſe of the earl of Derby with regard to the iſle of Man in the reign of queen Elizabeth, and the earl of Cardigan and others, as repreſentatives of the duke of Montague, with relation to the iſland of St. Vincent in 1764. But from all the dominions of the crown, excepting Great Britain and Ireland, an *appellate* juriſdiction
[232] (in the laſt reſort) is veſted in the ſame tribunal; which uſually exerciſes it's judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majeſty in council, by whom the judgment is finally given (4).

THE *privileges* of privy counſellors, as ſuch, (abſtracted from their honorary precedence °,) conſiſt principally in the ſecurity which the law has given them againſt attempts and conſpiracies to deſtroy their lives. For, by ſtatute 3 Hen. VII. c. 14. if any of the king's ſervants, of his houſehold, conſpire or imagine to take away the life of a privy counſellor,

° See page 405.

(3) This is, in fact, a court of juſtice, which muſt conſiſt of at leaſt three privy counſellors.

(4) The court of privy council cannot decree *in perſonam* in England, unleſs in certain criminal matters; and the court of chancery cannot decree *in rem* out of the kingdom. See Lord Hardwicke's Arg. in Penn v Baltimore, 1 Veſ. 444 where the juriſdiction of the council and chancery, upon queſtions ariſing upon ſubject-matter abroad, is largely diſcuſſed.

it is felony, though nothing be done upon it. The reaſon of making this ſtatute, ſir Edward Coke[p] tells us, was becauſe ſuch a conſpiracy was, juſt before this parliament, made by ſome of king Henry the ſeventh's houſehold ſervants, and great miſchief was like to have enſued thereupon. This extends only to the king's menial ſervants. But the ſtatute 9 Ann. c. 16. goes farther, and enacts, that *any perſon* that ſhall unlawfully attempt to kill, or ſhall unlawfully aſſault, and ſtrike, or wound, any privy counſellor in the execution of his office, ſhall be a felon without benefit of clergy. This ſtatute was made upon the daring attempt of the ſieur Guiſcard, who ſtabbed Mr. Harley, afterwards earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council.

THE *diſſolution* of the privy council depends upon the king's pleaſure; and he may, whenever he thinks proper, diſcharge any particular member, or the whole of it, and appoint another. By the common law alſo it was diſſolved *ipſo facto* by the king's demiſe; as deriving all it's authority from him. But now, to prevent the inconveniencies of having no council in being at the acceſſion of a new prince, it is enacted by ſtatute 6 Ann. c. 7. that the privy council ſhall continue for ſix months after the demiſe of the crown, unleſs ſooner determined by the ſucceſſor.

[p] 3 Inſt. 38.

CHAPTER THE SIXTH.

OF THE KING'S DUTIES.

I PROCEED next to the duties, incumbent on the king by our conſtitution; in conſideration of which duties his dignity and prerogative are eſtabliſhed by the laws of the land: it being a maxim in the law, that protection and ſubjection are reciprocal[a]. And theſe reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that king James had broken the *original contract* between king and people. But, however, as the terms of that original contract were in ſome meaſure diſputed, being alleged to exiſt principally in theory, and to be only deducible by reaſon and the rules of natural law; in which deduction different underſtandings might very conſiderably differ; it was, after the revolution, judged proper to declare theſe duties expreſsly, and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raiſed by weak and ſcrupulous minds about the exiſtence of ſuch an original contract, they muſt now entirely ceaſe; eſpecially with regard to every prince, who hath reigned ſince the year 1688.

THE principal duty of the king is, to govern his people according to law. *Nec regibus infinita aut libera poteſtas*, was the conſtitution of our German anceſtors on the continent[b]. And this is not only conſonant to the principles of nature,
[234] of liberty, of reaſon, and of ſociety, but has always been eſteemed an expreſs part of the common law of England, even when prerogative was at the higheſt. "The king," ſaith Bracton[c], who wrote under Henry III, "ought not

[a] 7 Rep. 5. [b] Tac. *de mor. Germ. c.* 7. [c] *l.* 1. *c.* 8.

"to

" to be ſubject to man, but to God, and to the law; for the " law maketh the king. Let the king therefore render to " the law, what the law has inveſted in him with regard " to others; dominion and power: for he is not truly king, " where will and pleaſure rules, and not the law." And again [d], " the king alſo hath a ſuperior, namely God, and " alſo the law, by which he was made a king (1)." Thus Bracton: and Forteſcue alſo [e], having firſt well diſtinguiſhed between a monarchy abſolutely and deſpotically regal, which is introduced by conqueſt and violence, and a political or civil monarchy, which ariſes from mutual conſent, (of which laſt ſpecies he aſſerts the government of England to be,) immediately lays it down as a principle, that " the king of " England muſt rule his people according to the decrees of " the laws thereof: inſomuch that he is bound by an oath " at his coronation to the obſervance and keeping of his own " laws." But, to obviate all doubts and difficulties concerning this matter, it is expreſsly declared by ſtatute 12 & 13 W. III. c. 2. " that the laws of England are the birthright " of the people thereof; and all the kings and queens who " ſhall aſcend the throne of this realm ought to adminiſter " the government of the ſame according to the ſaid laws; " and all their officers and miniſters ought to ſerve them " reſpectively according to the ſame: and therefore all the " laws and ſtatutes of this realm, for ſecuring the eſtabliſhed " religion, and the rights and liberties of the people thereof, " and all other laws and ſtatutes of the ſame now in force, " are ratified and confirmed accordingly."

[d] *l.* 2. *c.* 16. § 3. [e] *c.* 9. & 34.

(1) This is alſo well and ſtrongly expreſſed in the year-books: *La ley eſt le plus haute inheritance que le roy ad; car par la ley il même et touts ſes ſujets ſont rulés, et ſi le ley ne fuit, nul roi, et nul inheritance ſera.*—19 Hen. VI. 63.

In Engliſh: The law is the higheſt inheritance which the king has; for by the law he himſelf and all his ſubjects are governed, and if there were no law, there would be neither king nor inheritance.

AND, as to the terms of the original contract between king and people, theſe I apprehend to be now couched in the
[235] coronation oath, which by the ſtatute 1 W. & M. ſt. 1. c. 6. is to be adminiſtered to every king and queen, who ſhall ſucceed to the imperial crown of theſe realms, by one of the archbiſhops or biſhops of the realm, in the preſence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

"*The archbiſhop or biſhop ſhall ſay*, Will you ſolemnly promiſe and ſwear to govern the people of this kingdom of "England, and the dominions thereto belonging, according "to the ſtatutes in parliament agreed on, and the laws and "cuſtoms of the ſame?—*The king or queen ſhall ſay*, I ſolemnly promiſe ſo to do.——*Archbiſhop or biſhop*. Will you "to your power cauſe law and juſtice, in mercy, to be executed in all your judgments?—*King or queen*. I will. "——*Archbiſhop or biſhop*. Will you to the utmoſt of your "power maintain the laws of God, the true profeſſion of "the goſpel, and the proteſtant reformed religion eſtabliſhed "by the law? And will you preſerve unto the biſhops and "clergy of this realm, and to the churches committed to "their charge, all ſuch rights and privileges as by law do "or ſhall appertain unto them, or any of them?—*King or "queen*. All this I promiſe to do.——*After this the king or "queen, laying his or her hand upon the holy goſpels, ſhall ſay*, "The things which I have here before promiſed I will perform and keep: ſo help me God: *and then ſhall kiſs the "book* (2)."

(2) And it is required both by the bill of rights, 1 W. & M. ſt. 2. c. 2. and the act of ſettlement 12 & 13 W. III. c. 2. that every king and queen of the age of twelve years, either at their coronation, or on the firſt day of the firſt parliament upon the throne in the houſe of peers, (which ſhall firſt happen,) ſhall repeat and ſubſcribe the declaration againſt popery according to the 30 Car. II. ſt. 2. c. 1.

THIS

THIS is the form of the coronation-oath, as it is now preſcribed by our laws; the principal articles of which appear to be at leaſt as antient as the mirror of juſtices [f], and even as the time of Bracton [g]: but the wording of it was changed at the revolution, becauſe (as the ſtatute alleges) the oath itſelf had been framed in doubtful words and expreſſions, with relation to antient laws and conſtitutions at this time unknown [h]. However, in what form ſoever it be conceived, this is moſt indiſputably a fundamental and original expreſs contract; though doubtleſs the duty of protection is impliedly as much incumbent on the ſovereign before coronation as after: in the ſame manner as allegiance to the king becomes the duty of the ſubject immediately on the deſcent of the crown, before he has taken the oath of allegiance, or whether he ever takes it all. This reciprocal duty of the ſubject will be conſidered in it's proper place. At preſent we are only to obſerve, that in the king's part of this original contract are expreſſed all the duties that a monarch can owe to his people: *viz.* to govern according to law; to execute judgment in mercy; and to maintain the eſtabliſhed religion. And, with reſpect to the latter of theſe three branches, we may farther remark, that by the act of union, 5 Ann. c. 8. two preceding ſtatutes are recited and confirmed; the one of the [236]

[f] *cap.* 1. § 2.

[g] *l.* 3. *tr.* 1. *c.* 9.

[h] In the old folio abridgment of the ſtatutes, printed by Lettou and Machlinia in the reign of Edward IV, (*penes me*) there is preſerved a copy of the old coronation-oath; which, as the book is extremely ſcarce, I will here tranſcribe. *Ceo eſt le forement que le roy jurre a ſoun coronement: que il gardera et meintenera les droites et les franchiſes de ſeynt eſgliſe grauntez auncienment des droitez roys chriſtiens dEngletere, et quil gardera toutes ſes terres honoures et dignites droiturelx et franks del coron du roialme dEngletere en tout maner dentier ſe ſanz null maner damenuſement, et les droites diſpergez diloſidez au perdux de la corone a ſoun poiair reappoller en launcien eſtate, et quil gardera le peas de ſeynt eſgliſe et al clergie et al people de bon accorde, et quil face faire en toutes ſes jugementes owel et droit juſtice ou diſcretion et miſericorde, et quil grauntera a tenure lez leyes et cuſtumes du roialme, et a ſoun poiar lez face garder et affirmer que les gentez du people avont faites et eſlies, et les malveys loyn et cuſtumes de tout ouſtera, et ferme peas et eſtablie al people de ſoun roialme en ceo garde eſgardera a ſoun poiair; come Dieu luy aide. (Tit. ſacramentum regis. fol. m. ij.)* Prynne has alſo given us a copy of the coronation-oaths of Richard II, (Signal Loyalty. II. 246.) Edward VI, (*ibid.* 251.) James I, and Charles I, (*ibid.* 269.).

parliament of Scotland, the other of the parliament of England: which enact; the former, that every king at his acceſſion ſhall take and ſubſcribe an oath, to preſerve the proteſtant religion and preſbyterian church government in Scotland; the latter, that at his coronation he ſhall take and ſubſcribe a ſimilar oath, to preſerve the ſettlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

Sr. IOHN FORTESCU Kt.
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CHAPTER THE SEVENTH.

OF THE KING'S PREROGATIVE.

IT was obſerved in a former chapter[a], that one of the principal bulwarks of civil liberty, or (in other words) of the Britiſh conſtitution, was the limitation of the king's prerogative by bounds ſo certain and notorious, that it is impoſſible he ſhould ever exceed them, without the conſent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all ſtates impliedly, and in ours moſt expreſsly, ſubſiſts between the prince and the ſubject. It will now be our buſineſs to conſider this prerogative minutely; to demonſtrate it's neceſſity in general; and to mark out in the moſt important inſtances it's particular extent and reſtrictions: from which conſiderations this concluſion will evidently follow, that the powers, which are veſted in the crown by the laws of England, are neceſſary for the ſupport of ſociety; and do not intrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*.

THERE cannot be a ſtronger proof of that genuine freedom, which is the boaſt of this age and country, than the power of diſcuſſing and examining, with decency and reſpect, the limits of the king's prerogative. A topic, that in ſome former ages was thought too delicate and ſacred to be profaned by the pen of a ſubject. It was ranked among the *arcana imperii*: and, like the myſteries of the *bona dea*, was

[a] chap. 1. page 141.

not ſuffered to be pried into by any but ſuch as were initiated in it's ſervice: becauſe perhaps the exertion of the one, like the ſolemnities of the other, would not bear the inſpection of a rational and ſober inquiry. The glorious queen Elizabeth herſelf made no ſcruple to direct her parliaments to abſtain from diſcourſing of matters of ſtate [b]; and it was the conſtant language of this favourite princeſs and her miniſters, that even that auguſt aſſembly "ought not to deal, to judge, "or to meddle with her majeſty's prerogative royal [c]." And her ſucceſſor, king James the firſt, who had imbibed high notions of the divinity of regal ſway, more than once laid it down in his ſpeeches, that "as it is atheiſm and "blaſphemy in a creature to diſpute what the deity may do, "ſo it is preſumption and ſedition in a ſubject to diſpute "what a king may do in the height of his power: good "chriſtians, he adds, will be content with God's will, re-"vealed in his word; and good ſubjects will reſt in the "king's will, revealed in *his* law [d]."

BUT, whatever might be the ſentiments of ſome of our princes, this was never the language of our antient conſtitution and laws. The limitation of the regal authority was a firſt and eſſential principle in all the Gothic ſyſtems of government eſtabliſhed in Europe; though gradually driven out and overborne, by violence and chicane, in moſt of the kingdoms on the continent. We have ſeen, in the preceding chapter, the ſentiments of Bracton and Forteſcue, at the diſtance of two centuries from each other. And ſir Henry Finch, under Charles the firſt, after the lapſe of two centuries more, though he lays down the law of prerogative in very ſtrong and emphatical terms, yet qualifies it with a general reſtriction, in regard to the liberties of the people. "The "king hath a prerogative in all things that are not injurious "to the ſubject; for in them all it muſt be remembered, "that the king's prerogative ſtretcheth not to the doing of "any wrong [e]." *Nihil enim aliud poteſt rex, niſi id ſolum quod*

[b] D'ewes. 479.
[c] *Ibid.* 645.
[d] King James's works. 557. 531.
[e] Finch. L. 84, 85.

do

de jure poteſt[f]. And here it may be ſome ſatisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expreſſed it) the authority of the prince over the laws. It is a maxim of the Engliſh law, as we have ſeen from Bracton, that "*rex debet eſſe ſub lege, quia* "*lex facit regem*:" the imperial law will tell us, that, "*in* "*omnibus, imperatoris excipitur fortuna; cui ipſus leges Deus* "*ſubjecit*[g]." We ſhall not long heſitate to which of them to give the preference, as moſt conducive to thoſe ends for which ſocieties were framed, and are kept together; eſpecially as the Roman lawyers themſelves ſeem to be ſenſible of the unreaſonableneſs of their own conſtitution. "*Decet* "*tamen principem*," ſays Paulus, "*ſervare leges, quibus ipſe* "*ſolutus eſt*[h]." This is at once laying down the principle of deſpotic power, and at the ſame time acknowleging it's abſurdity.

By the word prerogative we uſually underſtand that ſpecial pre-eminence, which the king hath, over and above all other perſons, and out of the ordinary courſe of the common law, in right of his regal dignity. It ſignifies, in it's etymology, (from *prae* and *rogo*) ſomething that is required or demanded before, or in preference to, all others. And hence it follows, that it muſt be in it's nature ſingular and eccentrical; that it can only be applied to thoſe rights and capacities which the king enjoys alone, in contradiſtinction to others, and not to thoſe which he enjoys in common with any of his ſubjects: for if once any one prerogative of the crown could be held in common with the ſubject, it would ceaſe to be prerogative any longer. And therefore Finch[i] lays it down as a maxim, that the prerogative is that law in caſe of the king, which is law in no caſe of the ſubject.

PREROGATIVES are either *direct* or *incidental*. The *direct* are ſuch poſitive ſubſtantial parts of the royal character and

[f] Bracton. *l.* 3. *tr.* 1. c. 9.
[g] *Nov.* 105. § 2.
[h] *Ff.* 32. 1. 23.
[i] Finch. L. 85.

authority,

authority, as are rooted in and ſpring from the king's political perſon, conſidered merely by itſelf, without reference to any other extrinſic circumſtance; as, the right of ſending embaſſadors, of creating peers, and of making war or peace. But ſuch prerogatives as are *incidental* bear always a relation to ſomething elſe, diſtinct from the king's perſon; and are indeed only exceptions, in favour of the crown, to thoſe general rules that are eſtabliſhed for the reſt of the community: ſuch as, that no coſts ſhall be recovered againſt the king; that the king can never be a joint-tenant; and that his debt ſhall be preferred before a debt to any of his ſubjects. Theſe, and an infinite number of other inſtances, will better be underſtood, when we come regularly to conſider the rules themſelves, to which theſe incidental prerogatives are exceptions. And therefore we will at preſent only dwell upon the king's ſubſtantive or direct prerogatives.

THESE ſubſtantive or direct prerogatives may again be divided into three kinds: being ſuch as regard, firſt, the king's royal *character*; ſecondly, his royal *authority*; and, laſtly, his royal *income*. Theſe are neceſſary, to ſecure reverence to his perſon, obedience to his commands, and an affluent ſupply for the ordinary expences of government; without all of which it is impoſſible to maintain the executive power in due independence and vigour. Yet, in every branch of this large and extenſive dominion, our free conſtitution has interpoſed ſuch ſeaſonable checks and reſtrictions, as may curb it from trampling on thoſe liberties, which it was meant to ſecure and eſtabliſh. The enormous weight of prerogative, if left to itſelf, (as in arbitrary governments it is,) ſpreads havoc and deſtruction among all the inferior movements; but, when balanced and regulated (as with us) by it's proper counterpoiſe, timely and judiciouſly applied, it's operations are then equable and certain, it invigorates the whole machine, and enables every part to anſwer the end of it's conſtruction.

IN the preſent chapter we ſhall only conſider the two firſt of theſe diviſions, which relate to the king's political *character*

racter and *authority*: or, in other words, his *dignity* and regal *power*; to which laſt the name of prerogative is frequently narrowed and confined. The other diviſion, which forms the royal *revenue*, will require a diſtinct examination; according to the known diſtribution of the feodal writers, who diſtinguiſh the royal prerogatives into the *majora* and *minora regalia*, in the latter of which claſſes the rights of the revenue are ranked. For to uſe their own words, "*majora regalia* "*imperii prae-eminentiam ſpectant; minora vero ad commodum* "*pecuniarium immediate attinent; et haec proprie fiſcalia ſunt,* "*et ad jus fiſci pertinent*[k]."

FIRST, then, of the royal dignity. Under every monarchical eſtabliſhment, it is neceſſary to diſtinguiſh the prince from his ſubjects, not only by the outward pomp and decorations of majeſty, but alſo by aſcribing to him certain qualities, as inherent in his royal capacity, diſtinct from and ſuperior to thoſe of any other individual in the nation. For, though a philoſophical mind will conſider the royal perſon merely as one man appointed by mutual conſent to preſide over many others, and will pay him that reverence and duty which the principles of ſociety demand, yet the maſs of mankind will be apt to grow inſolent and refractory, if taught to conſider their prince as a man of no greater perfection than themſelves. The law therefore aſcribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewiſe certain attributes of a great and tranſcendent nature; by which the people are led to conſider him in the light of a ſuperior being, and to pay him that awful reſpect, which may enable him with greater eaſe to carry on the buſineſs of government. This is what I underſtand by the royal dignity, the ſeveral branches of which we ſhall now proceed to examine.

I. AND, firſt, the law aſcribes to the king the attribute of *ſovereignty*, or pre-eminence. "*Rex eſt vicarius*," ſays Bracton[l], "*et miniſter Dei in terra: omnis quidem ſub eo eſt, et ipſe*

[k] *Peregrin. de jure fiſc. l.* 1. *c.* 1. *num.* 9. [l] *l.* 1. *c.* 8.

"*ſub*

"*ſub nullo, niſi tantum ſub Deo* (1)." He is ſaid to have *imperial* dignity; and in charters before the conqueſt is frequently ſtiled *baſileus* and *imperator*, the titles reſpectively aſſumed by the emperors of the eaſt and weſt [m]. His realm is declared to be an *empire*, and his crown *imperial*, by many acts of parliament, particularly the ſtatutes 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 28 [n]; which at the ſame time declare the king to be the ſupreme head of the realm in matters both civil and eccleſiaſtical, and of conſequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not, (as the creation of notaries and the like,) and that all kings were in ſome degree ſubordinate and ſubject to the emperor of Germany or Rome. The meaning therefore of the legiſlature, when it uſes theſe terms of *empire* and *imperial*, and applies them to the realm and crown of England, is only to aſſert that our king is equally ſovereign and independent within theſe his dominions, as any emperor is in his empire [o]; and owes no kind of ſubjection to any other potentate upon earth. Hence it is, that no ſuit or action can be brought againſt the king, even in civil matters, becauſe no court can have juriſdiction over him. For all juriſdiction implies ſuperiority of power: authority to try would be vain and idle, without an authority to redreſs; and the ſentence of a court would be contemptible, unleſs that court had power to command the execution of it: but who, ſays Finch [p], ſhall command the king? Hence it is likewiſe, that

[m] Seld. tit. of hon. I. 2.

[n] See alſo 24 Geo. II. c. 24. 5 Geo. III. c. 27.

[o] *Rex allegavit, quod ipſe omnes liberates haberet in regno ſuo, quas imperator vendicabat in imperio.* (M. Paris, *A. D.* 1095.)

[p] Finch. L. 83.

(1) What Bracton adds in the ſame chapter ought never to be forgotten: *Ipſe autem rex non debet eſſe ſub homine, ſed ſub Deo et ſub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et poteſtatem, non eſt enim rex, ubi dominatur voluntas et non lex.*

by

by law the perſon of the king is ſacred, even though the meaſures purſued in his reign be completely tyrannical and arbitrary: for no juriſdiction upon earth has power to try him in a criminal way; much leſs to condemn him to puniſhment. If any foreign juriſdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and, if ſuch a power were veſted in any domeſtic tribunal, there would ſoon be an end of the conſtitution, by deſtroying the free agency of one of the conſtituent parts of the ſovereign legiſlative power. [243]

ARE then, it may be aſked, the ſubjects of England totally deſtitute of remedy, in caſe the crown ſhould invade their rights, either by private injuries, or public oppreſſions? To this we may anſwer, that the law has provided a remedy in both caſes.

AND, firſt, as to private injuries: if any perſon has, in point of property, a juſt demand upon the king, he muſt petition him in his court of chancery, where his chancellor will adminiſter right as a matter of grace, though not upon compulſion [q]. And this is entirely conſonant to what is laid down by the writers on natural law. "A ſubject," ſays Puffendorf [r], "ſo long as he continues a ſubject, hath no way "to *oblige* his prince to give him his due, when he refuſes it; "though no wiſe prince will ever refuſe to ſtand to a lawful "contract. And, if the prince gives the ſubject leave to en"ter an action againſt him, upon ſuch contract, in his own "courts, the action itſelf proceeds rather upon natural equity, "than upon the municipal laws." For the end of ſuch action is not to *compel* the prince to obſerve the contract, but to *perſuade* him. And, as to perſonal wrongs; it is well obſerved by Mr. Locke [s], "the harm which the ſovereign can do in "his own perſon not being likely to happen often, nor to "extend itſelf far; nor being able by his ſingle ſtrength to "ſubvert the laws, nor oppreſs the body of the people,

[q] Finch. L. 255. See b. III. c. 17.
[r] Law of N. and N. b. 8. c. 10.
[s] on Gov. p. 2. § 205.

"(ſhould

" (ſhould any prince have ſo much weakneſs and ill-nature " as to endeavour to do it,)—the inconveniency therefore of " ſome particular miſchiefs, that may happen ſometimes, " when a heady prince comes to the throne, are well recom- " penſed by the peace of the public and ſecurity of the " government, in the perſon of the chief magiſtrate being " thus ſet out of the reach of danger."

[244] NEXT, as to caſes of ordinary public oppreſſion, where the vitals of the conſtitution are not attacked, the law hath alſo aſſigned a remedy. For as a king cannot miſuſe his power, without the advice of evil counſellors, and the aſſiſtance of wicked miniſters, theſe men may be examined and puniſhed. The conſtitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man ſhall dare to aſſiſt the crown in contradiction to the laws of the land. But it is at the ſame time a maxim in thoſe laws, that the king himſelf can do no wrong: ſince it would be a great weakneſs and abſurdity in any ſyſtem of poſitive law, to define any poſſible wrong, without any poſſible redreſs.

FOR, as to ſuch public oppreſſions as tend to diſſolve the conſtitution, and ſubvert the fundamentals of government, they are caſes, which the law will not, out of decency, ſuppoſe: being incapable of diſtruſting thoſe, whom it has inveſted with any part of the ſupreme power; ſince ſuch diſtruſt would render the exerciſe of that power precarious and impracticable [t]. For, wherever the law expreſſes it's diſtruſt of abuſe of power, it always veſts a ſuperior coercive authority in ſome other hand to correct it; the very notion of which deſtroys the idea of ſovereignty. If therefore (for example) the two houſes of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houſes,

[t] See theſe points more fully diſcuſſed in the *conſiderations of the law of forfeiture*, 3d edit. pag. 109—126. wherein the very learned author has thrown many new and important lights on the texture of our happy conſtitution.

that

that branch of the legiſlature, ſo ſubject to animadverſion, would inſtantly ceaſe to be part of the ſupreme power; the balance of the conſtitution would be overturned; and that branch or branches, in which this juriſdiction reſided, would be completely ſovereign. The ſuppoſition of *law* therefore is, that neither the king nor either houſe of parliament (collectively taken) is capable of doing any wrong; ſince in ſuch caſes the law feels itſelf incapable of furniſhing any adequate remedy. For which reaſon all oppreſſions, which may happen to ſpring from any branch of the ſovereign power, muſt neceſſarily be out of the reach of any *ſtated rule*, or *expreſs legal* proviſion: but, if ever they unfortunately happen, the prudence of the times muſt provide new remedies upon new emergencies. [245]

INDEED, it is found, by experience, that whenever the unconſtitutional oppreſſions, even of the ſovereign power, advance with gigantic ſtrides and threaten deſolation to a ſtate, mankind will not be reaſoned out of the feelings of humanity; nor will ſacrifice their liberty by a ſcrupulous adherence to thoſe political maxims, which were originally eſtabliſhed to preſerve it. And therefore, though the poſitive laws are ſilent, experience will furniſh us with a very remarkable caſe, wherein nature and reaſon prevailed. When king James the ſecond invaded the fundamental conſtitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new ſettlement of the crown. And ſo far as this precedent leads, and no farther, we may now be allowed to lay down the *law* of redreſs againſt public oppreſſion. If therefore any future prince ſhould endeavour to ſubvert the conſtitution by breaking the original contract between king and people, ſhould violate the fundamental laws, and ſhould withdraw himſelf out of the kingdom; we are now authorized to declare that this conjunction of circumſtances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to ſay that any one, or two, of theſe ingredients would amount to ſuch a ſituation; for there our precedent

would fail us. In theſe therefore, or other circumſtances, which a fertile imagination may furniſh, ſince both law and hiſtory are ſilent, it becomes us to be ſilent too; leaving to future generations, whenever neceſſity and the ſafety of the whole ſhall require it, the exertion of thoſe inherent (though latent) powers of ſociety, which no climate, no time, no conſtitution, no contract, can ever deſtroy or diminiſh.

[246] II. BESIDES the attribute of ſovereignty, the law alſo aſcribes to the king, in his political capacity, abſolute *perfection*. The king can do no wrong. Which ancient and fundamental maxim is not to be underſtood, as if every thing tranſacted by the government was of courſe juſt and lawful, but means only two things. Firſt, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he anſwerable for it perſonally to his people: for this doctrine would totally deſtroy that conſtitutional independence of the crown, which is neceſſary for the balance of power in our free and active, and therefore compounded, conſtitution. And, ſecondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice [a] (2).

THE king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to

[a] Plowd. 487.

(2) Or perhaps it means that, although the king is ſubject to the paſſions and infirmities of other men, the conſtitution has preſcribed no mode by which he can be made perſonally amenable for any wrong that he may actually commit. The law will therefore preſume no wrong, where it has provided no remedy.

The inviolability of the king is eſſentially neceſſary to the free exerciſe of thoſe high prerogatives, which are veſted in him, not for his own private ſplendour and gratification, as the vulgar and ignorant are too apt to imagine, but for the ſecurity and preſervation of the real happineſs and liberty of his ſubjects.

do an improper thing: in him is no folly or weakneſs. And therefore if the crown ſhould be induced to grant any franchiſe or privilege to a ſubject contrary to reaſon, or in any wiſe prejudicial to the commonwealth, or a private perſon, the law will not ſuppoſe the king to have meant either an unwiſe or an injurious action, but declares that the king was deceived in his grant; and thereupon ſuch grant is rendered void, merely upon the foundation of fraud and deception, either by or upon thoſe agents, whom the crown has thought proper to employ. For the law will not caſt an imputation on that magiſtrate whom it intruſts with the executive power, as if he was capable of intentionally diſregarding his truſt: but attributes to mere impoſition (to which the moſt perfect of ſublunary beings muſt ſtill continue liable) thoſe little inadvertencies, which, if charged on the will of the prince, might leſſen him in the eyes of his ſubjects.

YET ſtill, notwithſtanding this perſonal perfection, which [247] the law attributes to the ſovereign, the conſtitution has allowed a latitude of ſuppoſing the contrary, in reſpect to both houſes of parliament; each of which, in it's turn, hath exerted the right of remonſtrating and complaining to the king even of thoſe acts of royalty, which are moſt properly and perſonally his own; ſuch as meſſages ſigned by himſelf, and ſpeeches delivered from the throne. And yet, ſuch is the reverence which is paid to the royal perſon, that though the two houſes have an undoubted right to conſider theſe acts of ſtate in any light whatever, and accordingly treat them in their addreſſes as perſonally proceeding from the prince, yet among themſelves (to preſerve the more perfect decency, and for the greater freedom of debate) they uſually ſuppoſe them to flow from the advice of the adminiſtration. But the privilege of canvaſſing thus freely the perſonal acts of the ſovereign (either directly, or even through the medium of his reputed adviſers) belongs to no individual, but is confined to thoſe auguſt aſſemblies: and there too the objections muſt be propoſed with the utmoſt reſpect and deference.

One member was ſent to the tower [w], for ſuggeſting that his majeſty's anſwer to the addreſs of the commons contained "high words to fright the members out of their duty;" and another [x], for ſaying that a part of the king's ſpeech "ſeemed rather to be calculated for the meridian of Ger-"many than Great Britain, and that the king was a ſtran-"ger to our language and conſtitution."

IN farther purſuance of this principle, the law alſo determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the ſtanding maxim upon all occaſions (3): for the law intends that the king is always buſied for the public good, and therefore has not leiſure to aſſert his right within the times limited to ſubjects [y]. In the king alſo can be no
[248] ſtain or corruption of blood: for if the heir to the crown were attainted of treaſon or felony, and afterwards the crown ſhould deſcend to him, this would purge the attainder *ipſo facto* [z]. And therefore when Henry VII, who as earl of Richmond ſtood attainted, came to the crown, it was not thought neceſſary to paſs an act of parliament to reverſe this attainder; becauſe, as lord Bacon in his hiſtory of that prince informs us, it was agreed that the aſſumption of the crown had at once purged all attainders. Neither can the king in judg-

[w] Com. Journ. 18 Nov. 1685.
[x] *Ibid.* 4 Dec. 1717.
[y] Finch. L. 82. Co. Litt. 90.
[z] Finch. L. 82.

(3) In civil actions relating to landed property, by the 9 Geo. III. c. 16. the king like a ſubject is limited to ſixty years. See 3 vol. 307. This maxim applies alſo to criminal proſecutions, which are brought in the name of the king, and therefore by the common law there is no limitation in treaſons, felonies, or miſdemeanors. By the 7 W. III. c. 7. an indictment for treaſon, except for an attempt to aſſaſſinate the king, muſt be found within three years after the commiſſion of the treaſonable act. 4 Vol. 351. But where the legiſlature has fixed no limit, *nullum tempus occurrit regi* holds true: thus a man may be convicted of murder at any diſtance of time within his life after the commiſſion of the crime. This maxim obtains ſtill in full force in Ireland. 1 *Ld. Mountm.* 365.

ment

ment of law, as king, ever be a minor or under age; and therefore his royal grants and aſſents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one [a]. By a ſtatute indeed, 28 Hen. VIII. c. 17. power was given to future kings to reſcind and revoke all acts of parliament that ſhould be made while they were under the age of twenty-four: but this was repealed by the ſtatute 1 Edw. VI. c. 11. ſo far as related to that prince; and both ſtatutes are declared to be determined by 24 Geo. II. c. 24. It hath alſo been uſually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very neceſſity of ſuch extraordinary proviſion is ſufficient to demonſtrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian [b].

[a] Co. Litt. 43. 2 Inſt. proem. 3.

[b] The methods of appointing this guardian or regent have been ſo various, and the duration of his power ſo uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore (as ſir Edward Coke ſays, 4 Inſt. 58.) the ſureſt way is to have him made by authority of the great council in parliament. The earl of Pembroke, by his own authority aſſumed in very troubleſome times the regency of Hen. III, who was then only nine years old; but was declared of full age by the pope at ſeventeen, confirmed the great charter at eighteen, and took upon him the adminiſtration of the government at twenty. A guardian and council of regency were named for Edward III, by the parliament, which depoſed his father; the young king being then fifteen, and not aſſuming the government till three years after. When Richard II ſucceeded at the age of eleven, the duke of Lancaſter took upon him the management of the kingdom, till the parliament met, which appointed a nominal council to aſſiſt him. Henry V on his death-bed named a regent and a guardian for his infant ſon Henry VI, then nine months old: but the parliament altered his diſpoſition, and appointed a protector and council, with a ſpecial limited authority. Both theſe princes remained in a ſtate of pupilage till the age of twenty-three. Edward V, at the age of thirteen, was recommended by his father to the care of the duke of Glocester; who was declared protector by the privy council. The ſtatutes 25 Hen. VIII. c. 12. and 28 Hen. VIII. c. 7. provided, that the ſucceſſor, if a male and under eighteen, or if a female and under ſixteen, ſhould be till ſuch age in the government of his or her natural mother, (if approved by the king) and ſuch other counſellors as his majeſty ſhould by will or otherwiſe appoint: and he accordingly appointed his ſixteen executors to have the government of his ſon Edward VI, and the kingdom, which executors elected the earl of Hertford protector. The ſtatute 24 Geo. II. c. 24. in caſe the crown ſhould deſcend to any of the children of Frederic late prince of Wales under the age of eighteen, appointed

III. A THIRD attribute of the king's majesty is his *perpetuity*. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*; *demissio regis, vel coronae*: an expression which signifies merely a transfer of property; for, as is observed in Plowden [c], when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus too, when Edward the fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise*; and all proceſs was held to be discontinued, as upon a natural death of the king [d].

[250] WE are next to consider those branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a

pointed the princess dowager;—and that of 5 Geo. III. c. 27. in case of a like descent to any of his present majesty's children, empowers the king to name either the queen, the princess dowager, or any descendant of king George II residing in this kingdom;—to be guardian and regent, till the successor attains such age, assisted by a council of regency: the powers of them all being expressly defined and set down in the several acts.

[c] Plowd. 177. 234.

[d] M. 49 Hen. VI. pl. 1—S.

government;

government; and to unite thoſe ſeveral wills, and reduce them to one, is a work of more time and delay than the exigencies of ſtate will afford. The king of England is therefore not only the chief, but properly the ſole, magiſtrate of the nation; all others acting by commiſſion from, and in due ſubordination to him: in like manner as, upon the great revolution in the Roman ſtate, all the powers of the antient magiſtracy of the commonwealth were concentered in the new emperor: ſo that, as Gravina[e] expreſſes it, "*in ejus "unius perſona veteris reipublicae vis atque majeſtas per cumu-"latas magiſtratuum poteſtates exprimebatur.*"

AFTER what has been premiſed in this chapter, I ſhall not (I truſt) be conſidered as an advocate for arbitrary power, when I lay it down as a principle, that, in the exertion of lawful prerogative, the king is and ought to be abſolute; that is, ſo far abſolute, that there is no legal authority that can either delay or reſiſt him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleaſes: unleſs where the conſtitution hath expreſsly, or by evident conſequence, laid down ſome exception or boundary; declaring, that thus far the prerogative ſhall go and no farther. For otherwiſe the power of the crown would indeed be but a name and a ſhadow, inſufficient for the ends of government, if, where it's juriſdiction is clearly eſtabliſhed and allowed, any man or body of men were permitted to diſobey it, in the ordinary courſe of law: I ſay, in the *ordinary* courſe of law; for I do not now ſpeak of thoſe *extraordinary* recourſes to firſt principles, [251] which are neceſſary when the contracts of ſociety are in danger of diſſolution, and the law proves too weak a defence againſt the violence of fraud or oppreſſion. And yet the want of attending to this obvious diſtinction has occaſioned theſe doctrines, of abſolute power in the prince and of national reſiſtance by the people, to be much miſunderſtood and perverted, by the advocates for ſlavery on the one hand, and

[e] *Orig.* 1. § 103.

the demagogues of faction on the other. The former, obſerving the abſolute ſovereignty and tranſcendent dominion of the crown laid down (as it certainly is) moſt ſtrongly and emphatically in our law-books, as well as our homilies, have denied that any caſe can be excepted from ſo general and poſitive a rule; forgetting how impoſſible it is, in any practical ſyſtem of laws, to point out beforehand thoſe eccentrical remedies, which the ſudden emergence of national diſtreſs may dictate, and which that alone can juſtify. On the other hand, over-zealous republicans, feeling the abſurdity of unlimited paſſive obedience, have fancifully (or ſometimes factiouſly) gone over to the other extreme; and, becauſe reſiſtance is juſtifiable to the perſon of the prince when the being of the ſtate is endangered, and the public voice proclaims ſuch reſiſtance neceſſary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to reſiſt even private oppreſſion. A doctrine productive of anarchy, and (in conſequence) equally fatal to civil liberty as tyranny itſelf. For civil liberty, rightly underſtood, conſiſts in protecting the rights of individuals by the united force of ſociety: ſociety cannot be maintained, and of courſe can exert no protection, without obedience to ſome ſovereign power: and obedience is an empty name, if every individual has a right to decide how far he himſelf ſhall obey.

IN the exertion therefore of thoſe prerogatives, which the law has given him, the king is irreſiſtible and abſolute, according to the forms of the conſtitution. And yet, if the conſequence of that exertion be manifeſtly to the grievance or diſhonour of the kingdom, the parliament will call his adviſers
[252] to a juſt and ſevere account. For prerogative conſiſting (as Mr. Locke[f] has well defined it) in the diſcretionary power of acting for the public good, where the poſitive laws are ſilent; if that diſcretionary power be abuſed to the public detriment, ſuch prerogative is exerted in an unconſtitutional manner. Thus the king may make a treaty with a foreign ſtate, which ſhall irrevocably bind the nation; and yet, when

[f] on Gov. 2. § 166.

ſuch

ſuch treaties have been judged pernicious, impeachments have purſued thoſe miniſters, by whoſe agency or advice they were concluded.

THE prerogatives of the crown (in the ſenſe under which we are now conſidering them) reſpect either this nation's intercourſe with foreign nations, or it's own domeſtic government and civil polity.

WITH regard to foreign concerns, the king is the delegate or repreſentative of his people. It is impoſſible that the individuals of a ſtate, in their collective capacity, can tranſact the affairs of that ſtate with another community equally numerous as themſelves. Unanimity muſt be wanting to their meaſures, and ſtrength to the execution of their counſels. In the king therefore, as in a center, all the rays of his people are united, and form by that union a conſiſtency, ſplendor, and power, that make him feared and reſpected by foreign potentates; who would ſcruple to enter into any engagement, that muſt afterwards be reviſed and ratified by a popular aſſembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men. And ſo far is this point carried by our law, that it hath been held[z], that ſhould all the ſubjects of England make war with a king in league with the king of England, without the royal aſſent, ſuch war is no breach of the league. And, by the ſtatute 2 Hen. V. c. 6. any ſubject committing acts of hoſtility upon any nation in league with the king was declared to be guilty of high treaſon: and, though that act was repealed by the ſtatute 20 Hen. VI. c. 11. ſo far as relates to the making this offence high treaſon, yet ſtill it re- [253]
mains a very great offence againſt the law of nations, and puniſhable by our laws, either capitally or otherwiſe, according to the circumſtances of the caſe.

I. THE king, therefore, conſidered as the repreſentative of his people, has the ſole power of ſending embaſſadors to fo-

[z] 4 Inſt. 152.

reign ſtates, and receiving embaſſadors at home. This may lead us into a ſhort digreſſion, by way of inquiry, how far the municipal laws of England intermeddle with or protect the rights of theſe meſſengers from one potentate to another, whom we call embaſſadors.

THE rights, the powers, the duties, and the privileges of embaſſadors are determined by the law of nature and nations, and not by any municipal conſtitutions. For, as they repreſent the perſons of their reſpective maſters, who owe no ſubjection to any laws but thoſe of their own country, their actions are not ſubject to the control of the private law of that ſtate, wherein they are appointed to reſide. He that is ſubject to the coercion of laws is neceſſarily dependent on that power by whom thoſe laws were made: but an embaſſador ought to be independent of every power, except that by which he is ſent; and of conſequence ought not to be ſubject to the mere municipal laws of that nation, wherein he is to exerciſe his functions. If he groſsly offends, or makes an ill uſe of his character, he may be ſent home and accuſed before his maſter [h]; who is bound either to do juſtice upon him, or avow himſelf the accomplice of his crimes [i]. But there is great diſpute among the writers on the laws of nations, whether this exemption of embaſſadors extends to all crimes, as well natural as poſitive; or whether it only extends to ſuch as are *mala prohibita*, as coining, and not to thoſe that are *mala in ſe*, as murder [k]. Our law ſeems to have formerly taken in the reſtriction, as well as the general exemption.
[254] For it has been held, both by our common lawyers and civilians [l], that an embaſſador is privileged by the law of nature and nations; and yet, if he commits any offence againſt the law of reaſon and nature, he ſhall loſe his privilege [m]: and that therefore, if an embaſſador conſpires the death of the

[h] As was done with count Gyllenberg the Swediſh miniſter to Great Britain. *A. D.* 1716.

[i] Sp. L. 26. 21.

[k] Van Leeuwen *in Ff.* 50. 7. 17. Barbeyrac's Puff. *l.* 8. *c.* 9. § 9. & 17. Van Bynkerſhoek *de foro legator. c.* 17, 18, 19.

[l] 1 Roll. Rep. 175. 3 Bulſtr. 27.

[m] 4 Inſt. 153.

king

king in whoſe land he is, he may be condemned and executed for treaſon; but if he commits any other ſpecies of treaſon, it is otherwiſe, and he muſt be ſent to his own kingdom [n]. And theſe poſitions ſeem to be built upon good appearance of reaſon. For ſince, as we have formerly ſhewn, all municipal laws act in ſubordination to the primary law of nature, and, where they annex a puniſhment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural univerſal rule of juſtice embaſſadors, as well as other men, are ſubject in all countries; and of conſequence it is reaſonable that, wherever they tranſgreſs it, there they ſhall be liable to make atonement [o]. But, however theſe principles might formerly obtain, the general practice of this country, as well as of the reſt of Europe, ſeems now to purſue the ſentiments of the learned Grotius, that the ſecurity of embaſſadors is of more importance than the puniſhment of a particular crime [p]. And therefore few, if any, examples have happened within a century paſt, where an embaſſador has been puniſhed for any offence, however atrocious in it's nature (4).

[n] 1 Roll. Rep. 185.

[o] Foſter's reports. 188.

[p] *Securitas legatorum utilitati quae ex poena eſt praeponderat.* (*de jure b.* & *p.* 18 4 4.)

(4) In the year 1654, during the protectorate of Cromwell, Don Pataleon Sa, the brother of the Portugueſe embaſſador, who had been joined with him in the ſame commiſſion, was tried, convicted, and executed, for an atrocious murder. Lord Hale, 1. P. C. 99. approves of the proceeding; and Mr. J. Foſter (p. 188.) though a modern writer of law, lays it down that, "for murder and "other offences of great enormity, which are againſt the light of "nature and the fundamental laws of all ſociety, embaſſadors are "certainly liable to anſwer in the ordinary courſe of juſtice, as "other perſons offending in the like manner are:" but Mr. Hume obſerves upon this caſe, that "the laws of nations were here "plainly violated." 7 Vol. 237. And Vattel with irreſiſtible ability contends, that the univerſal inviolability of an embaſſador is an object of much greater importance to the world than their

IN reſpect to civil ſuits, all the foreign juriſts agree, that neither an embaſſador, or any of his train or *comites*, can be proſecuted for any debt or contract in the courts of that kingdom wherein he is ſent to reſide. Yet ſir Edward Coke maintains, that, if an embaſſador make a contract which is good *jure gentium*, he ſhall anſwer for it here [q]. But the truth is, ſo few caſes (if any) had ariſen, wherein the privilege was either claimed or diſputed, even with regard to civil ſuits, that our law-books are (in general) quite ſilent upon
[255] it previous to the reign of queen Anne; when an embaſſador from Peter the great, czar of Muſcovy, was actually arreſted and taken out of his coach in London [r], for a debt of fifty pounds which he had there contracted. Inſtead of ap-

[q] 4 Inſt. 153. [r] 21 July 1708. Boyer's annals of queen Anne.

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puniſhment for crimes however contrary to natural juſtice. "A "miniſter," ſays that profound writer, "is often charged with a "commiſſion diſagreeable to the prince to whom he is ſent. If "this prince has any power over him, and eſpecially if his autho- "rity be ſovereign, how is it to be expected that the miniſter can "execute his maſter's orders with a proper freedom of mind, "fidelity, and firmneſs? It is neceſſary he ſhould have no ſnares "to fear, that he cannot be diverted from his functions by any "chicanery. He muſt have nothing to hope, and nothing to fear, "from the ſovereign to whom he is ſent. Therefore, in order to "the ſucceſs of his miniſtry, he muſt be independent of the ſove- "reign's authority, and of the juriſdiction of the country both "civil and criminal." B. 4. c. 7. ſ. 92. where this ſubject is diſcuſſed in a moſt luminous manner. The Romans, in the infancy of their ſtate, acknowledged the expediency of the independence of embaſſadors; for when they had received embaſſadors from the Tarquin princes, whom they had dethroned, and had afterwards detected thoſe embaſſadors in ſecretly committing acts which might have been conſidered as treaſon againſt the ſtate, they ſent them back unpuniſhed; upon which Livy obſerves, *et quanquam viſi ſunt commiſiſſe, ut hoſtium loco eſſent, jus tamen gentium valuit.* Lib. 2. c. 4. When Bomilcar, *qui Romam fide publicâ venerat*, was proſecuted as an accomplice in the aſſaſſination of Maſſiva, Salluſt declares, *ſit reus magis ex æquo bonoque quam ex jure gentium.* Bell. Jug. c. 35.

plying

plying to be diſcharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The perſons who were concerned in the arreſt were examined before the privy council, (of which the lord chief juſtice Holt was at the ſame time ſworn a member [s],) and ſeventeen were committed to priſon [t]: moſt of whom were proſecuted by information in the court of queen's bench, at the ſuit of the attorney general [u], and at their trial before the lord chief juſtice were convicted of the facts by the jury [w], reſerving the queſtion of law, how far thoſe facts were criminal, to be afterwards argued before the judges; which queſtion was never determined (5). In the mean time the czar reſented this affront very highly, and demanded that the ſheriff of Middleſex and all others concerned in the arreſt ſhould be puniſhed with inſtant death [x]. But the queen (to the amazement of that deſpotic court) directed her ſecretary to inform him, "that ſhe could inflict no puniſhment upon any, the "meaneſt, of her ſubjects, unleſs warranted by the law of "the land: and therefore was perſuaded that he would not "inſiſt upon impoſſibilities [y]." To ſatisfy however the cla-

[s] 25 July 1708. *Ibid.*
[t] 25, 29 July 1708. *Ibid.*
[u] 23 Oct. 1708. *Ibid.*
[w] 14 Feb. 1708. *Ibid.*
[x] 17 Sept. 1708. *Ibid.*
[y] 11 Jan. 1708. *Ibid.* Mod. Un. Hiſt. xxxv. 454.

(5) In 3 Burr. 1480. lord Mansfield declares, that "the "ſtatute of queen Anne was not occaſioned by any doubt, whe-"ther the law of nations, particularly the part relative to public "miniſters, was not part of the law of England, and the infrac-"tion criminal, nor intended to vary an iota of it." And he proceeds to ſay, that lord Talbot, lord Hardwicke, and lord Holt, were clearly of the ſame opinion. But the infraction of the law of nations can only be a miſdemeanor puniſhable at the diſcretion of the court, by fine, impriſonment, and pillory; and therefore lord Mansfield ſays, the perſons convicted were never brought up to receive judgment; for "no puniſhment would have "been thought by the czar an adequate reparation. Such a ſen-"tence as the court would have given, he would have thought "a freſh inſult."

mours

mours of the foreign miniſters (who made it a common cauſe) as well as to appeaſe the wrath of Peter, a bill was brought into parliament [z], and afterwards paſſed into a law [c], to prevent and puniſh ſuch outrageous inſolence for the future. And with a copy of this act, elegantly engroſſed and illuminated, accompanied by a letter from the queen, an embaſſador extraordinary [b] was commiſſioned to appear at Moſcow [c], who declared "that though her majeſty could not inflict
[256] "ſuch a puniſhment as was required, becauſe of the defect "in that particular of the former eſtabliſhed conſtitutions "of her kingdom, yet, with the unanimous conſent of the "parliament, ſhe had cauſed a new act to be paſſed, to ſerve "as a law for the future." This humiliating ſtep was accepted as a full ſatisfaction by the czar; and the offenders, at his requeſt, were diſcharged from all farther proſecution.

THIS ſtatute [d] recites the arreſt which had been made, "in "contempt of the protection granted by her majeſty, con-"trary to the law of nations, and in prejudice of the rights "and privileges, which embaſſadors and other public mini-"ſters have at all times been thereby poſſeſſed of, and ought "to be kept ſacred and inviolable:" wherefore it enacts that for the future all proceſs whereby the perſon of any embaſſador, or of his domeſtic or domeſtic ſervant may be arreſted, or his goods diſtrained or ſeiſed, ſhall be utterly null and void; and the perſons proſecuting, ſoliciting, or executing ſuch proceſs ſhall be deemed violators of the law of nations, and diſturbers of the public repoſe; and ſhall ſuffer ſuch penalties and corporal puniſhment as the lord chancellor and the two chief juſtices, or any two of them, ſhall think fit (6). But it is expreſsly provided, that no trader, within the

[z] Com. Journ. 23 Dec. 1708.
[a] 21 Apr. 1709. Boyer, *ibid.*
[b] Mr. Whitworth.
[c] 8 Jan. 1709. Boyer, *ibid.*
[d] 7 Ann. c. 12.

(6) Perhaps it was intended as a compliment to the czar, that the offender is deprived of the trial by jury; and as he is to ſuffer any corporal puniſhment that two of theſe three judges may think fit

description of the bankrupt laws, who shall be in the service of any embassador, shall be privileged or protected by this act; nor shall any one be punished for arresting an embassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex (7). Exceptions that are strictly conformable to the rights of embassadors [e], as observed in the most civilized countries. And, in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land, and are [257] constantly allowed in the courts of common law [f].

II. IT is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power [g]; and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives ad-

[e] *Saepe quaesitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructior fiat legatio, sed unice ut lucro suo consulant, institores forte et mercatores. Et, quamvis hos saepe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationisve officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum.* Van Bynkersh. c. 15. *prope finem.*

[f] Fitzg. 200. Stra. 797.

[g] Puff. L. of N. b. 8. c. 9. § 6.

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fit to inflict, the czar would be induced to believe, that any future requisition of instant death, could be complied with; but as the statute has not made the offence felony, of course this punishment cannot extend to the privation of life.

(7) But he must besides be actually and *bonâ fide* a domestic servant. 3 *Burr.* 1676. 1 *Wils.* 20. 78.

vise-

vise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

III. Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power[h]: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized voluntiers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law[i]; *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: caeteri latrones aut praedones sunt.* And the reason which is given by
[258] Grotius[j], why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it,

[h] Puff. b. 8. c. 6. § 8. and Barbeyr. *in loc.*

[i] *Ff.* 50. 16. 118.

[j] *de jure b. & p. l.* 3. *c.* 3. § 11.

or

or the power of making peace. And the ſame check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general ſufficient to reſtrain the miniſters of the crown from a wanton or injurious exertion of this great prerogative.

IV. BUT, as the delay of making war may ſometimes be detrimental to individuals who have ſuffered by depredations from foreign potentates, our laws have in ſome reſpects armed the ſubject with powers to impel the prerogative; by directing the miniſters of the crown to iſſue letters of marque and repriſal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete ſtate of hoſtilities, and generally ending in a formal denunciation of war. Theſe letters are grantable by the law of nations [k], whenever the ſubjects of one ſtate are oppreſſed and injured by thoſe of another; and juſtice is denied by that ſtate to which the oppreſſor belongs. In this caſe letters of marque and repriſal (words uſed as ſynonimous; and ſignifying, the latter a taking in return, the former the paſſing the frontiers in order to ſuch taking[l]) may be obtained, in order to ſeiſe the bodies or goods of the ſubjects of the offending ſtate, until ſatisfaction be made, wherever they happen to be found. And indeed this [259] cuſtom of repriſals ſeems dictated by nature herſelf; for which reaſon we find in the moſt antient times very notable inſtances of it [m]. But here the neceſſity is obvious of calling in the ſovereign power, to determine when repriſals may be made; elſe every private ſufferer would be a judge in his own cauſe. In purſuance of which principle, it is with us declared by the ſtatute 4 Hen. V. c. 7. that if any ſubjects of the realm are oppreſſed in the time of truce by any foreigners, the king

[k] *Ibid. l.* 3. *c.* 2. § 4 & 5.

[l] Dufreſne. tit. *Marca.*

[m] See the account given by Neſtor, in the eleventh book of the Iliad, of the repriſals made by himſelf on the Epeian nation; from whom he took a multitude of cattle, as a ſatisfaction for a prize won at the Elian games by his father Neleus, and for debts due to many private ſubjects of the Pylian kingdom; out of which booty the king took three hundred head of cattle for his own demand, and the reſt were equitably divided among the other creditors.

will grant marque in due form, to all that feel themſelves grieved. Which form is thus directed to be obſerved: the ſufferer muſt firſt apply to the lord privy-ſeal; and he ſhall make out letters of requeſt under the privy-ſeal; and if, after ſuch requeſt of ſatisfaction made, the party required do not within convenient time make due ſatisfaction or reſtitution to the party grieved, the lord chancellor ſhall make him out letters of marque under the great ſeal; and by virtue of theſe he may attack and ſeiſe the property of the aggreſſor nation, without hazard of being condemned as a robber or pirate (8).

(8) The ſtatute of Hen. V. is confined to the time of a truce wherein there is no expreſs mention that all marques and repriſals ſhall ceaſe. This manner of granting letters of marque I conceive has long been diſuſed, and according to the ſtatute of Hen. V. could only be granted to perſons actually grieved.—But if, during a war, a ſubject without any commiſſion from the king ſhould take an enemy's ſhip, the prize would not be the property of the captor, but would be one of the *droits* of admiralty, and would belong to the king, or his grantee the admiral. *Carth.* 399. 2 *Woodd.* 433. Therefore, to encourage merchants and others to fit out privateers or armed ſhips in time of war, by various acts of parliament, the lord high admiral, or the commiſſioners of the admiralty, are empowered to grant commiſſions to the owners of ſuch ſhips; and the prizes captured ſhall be divided according to a contract entered into between the owners and the captain and crew of the privateer.—But the owners, before the commiſſion is granted, ſhall give ſecurity to the admiralty to make compenſation for any violation of treaties between thoſe powers with whom the nation is at peace. And by the 24 Geo. III. c. 47. they ſhall alſo give ſecurity that ſuch armed ſhip ſhall not be employed in ſmuggling. Theſe commiſſions in the ſtatutes, and upon all occaſions, are now called letters of marque. 29 *Geo. II. c.* 34. 19 *Geo. III. c.* 67. *Molloy, c.* 3. *ſ.* 8. Or ſometimes the lords of the admiralty have this authority by a proclamation from the king in council, as was the caſe in Dec. 1780, to empower them to grant letters of marque to ſeiſe the ſhips of the Dutch.

V. UPON exactly the ſame reaſon ſtands the prerogative of granting ſafe-conducts, without which by the law of nations no member of one ſociety has a right to intrude into another. And therefore Puffendorf very juſtly reſolves [n], that it is left in the power of all ſtates, to take ſuch meaſures about the admiſſion of ſtrangers, as they think convenient; thoſe being ever excepted who are driven on the coaſt by neceſſity, or by any cauſe that deſerves pity or compaſſion. Great tenderneſs is ſhewn by our laws, not only to foreigners in diſtreſs (as will appear when we come to ſpeak of ſhipwrecks) but with regard alſo to the admiſſion of ſtrangers who come ſpontaneouſly. For ſo long as their nation continues at peace with ours, and they themſelves behave peaceably, they are under the king's protection; though liable to be ſent home whenever [260] the king ſees occaſion. But no ſubject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himſelf upon the high ſeas, or ſend his goods and merchandize from one place to another, without danger of being ſeized by our ſubjects, unleſs he has letters of ſafe-conduct; which by divers antient ſtatutes [o] muſt be granted under the king's great ſeal and inrolled in chancery, or elſe are of no effect: the king being ſuppoſed the beſt judge of ſuch emergencies, as may deſerve exception from the general law of arms. But paſſports under the king's ſign-manual, or licences from his embaſſadors abroad, are now more uſually obtained, and are allowed to be of equal validity (9).

[n] Law of N. and N. b. 3. c. 3. § 9.

[o] 15 Hen. VI. c. 3. 18 Hen. VI. c. 8. 20 Hen. VI. c. 1.

(9) In order to prevent foreigners from arriving and continuing in England for the purpoſes of promoting ſedition and confuſion in this country, an act was paſſed 33 Geo. III. c. 4. in which various reſtraints are impoſed upon all aliens whatever.

By that ſtatute it is directed and provided, that all maſters of ſhips, upon their landing in England, ſhall declare what foreigners

INDEED the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable inſtances. One I cannot omit to mention: that by *magna carta*[p] it is provided, that all merchants (unleſs publicly prohibited before-hand) ſhall have ſafe conduct to depart from, to come into, to tarry in, and to go through England, for the exerciſe of merchandize, without any unreaſonable impoſts, except in time of war: and, if a war breaks out between us and their country, they ſhall be attached (if in England) without harm of body or goods, till the king or his chief juſticiary be informed how our merchants are treated in the land with which we are at war; and, if ours be ſecure in that land, they ſhall be ſecure in ours. This ſeems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook[q], that it was a maxim among the Goths and Swedes, "*quam legem exteri nobis* "*poſuere, eandem illis ponemus.*" But it is ſomewhat extraordinary, that it ſhould have found a place in *magna carta*, a mere interior treaty between the king and his natural-born ſubjects: which occaſions the learned Monteſquieu to remark with a degree of admiration, "that the Engliſh have made
[261] "the protection of *foreign* merchants one of the articles of

[p] c. 30. [q] *de jure Sueton. l.* 3. *c.* 4.

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they have on board; and all foreigners on their arrival in an Engliſh port ſhall give an account of their names, rank, and occupation, and where they have principally reſided for the laſt ſix months; and they ſhall import no arms or ammunition, except as merchandize; and they ſhall not depart from the place of their arrival without a paſſport from a magiſtrate.

And his majeſty is empowered to order that no aliens, except alien merchants, ſhall be landed, or that they ſhall be landed at certain places or under certain regulations; and he may alſo order any alien to reſide in a particular diſtrict, or to leave the kingdom within a limited time. For diſobedience of the directions of this ſtatute, an alien may be committed to gaol, and in ſome caſes may be tranſported for life.

"their

" their *national* liberty [r]." But indeed it well juſtifies another obſervation which he has made [s], " that the Engliſh know " better than any other people upon earth, how to value at " the ſame time theſe three great advantages, religion, li- " berty, and commerce." Very different from the genius of the Roman people; who in their manners, their conſtitution, and even in their laws, treated commerce as a diſhonourable employment, and prohibited the exerciſe thereof to perſons of birth, or rank, or fortune [t]: and equally different from the bigotry of the canoniſts, who looked on trade as inconſiſtent with chriſtianity [u], and determined at the council of Melfi, under pope Urban II. *A. D.* 1090, that it was impoſſible with a ſafe conſcience to exerciſe any traffic, or follow the profeſſion of the law [w].

THESE are the principal prerogatives of the king reſpecting this nation's intercourſe with foreign nations; in all of which he is conſidered as the delegate or repreſentative of his people. But in domeſtic affairs he is conſidered in a great variety of characters, and from thence there ariſes an abundant number of other prerogatives.

I. FIRST, he is a conſtituent part of the ſupreme legiſlative power; and, as ſuch, has the prerogative of rejecting ſuch proviſions in parliament, as he judges improper to be paſſed. The expediency of which conſtitution has before been evinced at large [x]. I ſhall only farther remark, that the king is not bound by any act of parliament, unleſs he be named therein by ſpecial and particular words. The moſt general words that can be deviſed (" any perſon or perſons, bodies

[r] Sp. L. 20. 13.

[s] *Ibid.* 20. 6.

[t] *Nobiliores natalibus, et bonorum luce conſpicuos, et patrimonio ditiores, pernicioſum urbibus mercimonium exercere prohibemus.* C 4. 63. 3.

[u] *Homo mercator vix aut nunquam poteſt Deo placere; et ideo nullus chriſtianus debet eſſe mercator; aut ſi voluerit eſſe, projiciatur de eccleſia Dei.* Decret. 1. 88. 11.

[w] *Falſa ſit poenitentia* [laici] *cum penitus ab officio curiali vel negotiali non recedit, quae ſine peccatis agi ulla ratione non praevalet.* Act. Concil. apud Baron. c. 16.

[x] ch. 2. pag. 154.

" politic, or corporate, *&c.*") affect not him in the leaſt, if
[262] they may tend to reſtrain or diminiſh any of his rights or intereſts [y]. For it would be of moſt miſchievous conſequence to the public, if the ſtrength of the executive power were liable to be curtailed without it's own expreſs conſent, by conſtructions and implications of the ſubject. Yet, where an act of parliament is expreſsly made for the preſervation of public rights and the ſuppreſſion of public wrongs, and does not interfere with the eſtabliſhed rights of the crown, it is ſaid to be binding as well upon the king as upon the ſubject [z]: and, likewiſe, the king may take the benefit of any particular act, though he be not eſpecially named [a].

II. THE king is conſidered, in the next place, as the generaliſſimo, or the firſt in military command, within the kingdom. The great end of ſociety is to protect the weakneſs of individuals by the united ſtrength of the community: and the principal uſe of government is to direct that united ſtrength in the beſt and moſt effectual manner, to anſwer the end propoſed. Monarchical government is allowed to be the fitteſt of any for this purpoſe: it follows therefore, from the very end of it's inſtitution, that in a monarchy the military power muſt be truſted in the hands of the prince.

IN this capacity therefore, of general of the kingdom, the king has the ſole power of raiſing and regulating fleets and armies. Of the manner in which they are raiſed and regulated I ſhall ſpeak more, when I come to conſider the military ſtate. We are now only to conſider the prerogative of enliſting and of governing them: which indeed was diſputed and claimed, contrary to all reaſon and precedent, by the long parliament of king Charles I; but, upon the reſtoration of his ſon, was ſolemnly declared by the ſtatute 13 Car. II. c. 6. to be in the king alone: for that the ſole ſupreme government and command of the militia within all his majeſty's realms and dominions, and of all forces by ſea and land, and

[y] 11 Rep. 74. [z] *Ibid.* 71. [a] 7 Rep. 32.

of

of all forts and places of ſtrength, ever was and is the undoubted right of his majeſty, and his royal predeceſſors, kings [263] and queens of England; and that both or either houſe of parliament cannot, nor ought to, pretend to the ſame.

THIS ſtatute, it is obvious to obſerve, extends not only to fleets and armies, but alſo to forts, and other places of ſtrength, within the realm; the ſole prerogative as well of erecting, as manning and governing of which, belongs to the king in his capacity of general of the kingdom [b]: and all lands were formerly ſubject to a tax, for building of caſtles wherever the king thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon anceſtors the *trinoda neceſſitas: ſc. pontis reparatio, arcis conſtructio, et expeditio contra hoſtem* [c]. And this they were called upon to do ſo often, that, as ſir Edward Coke from M. Paris aſſures us [d], there were in the time of Henry II. 1115 caſtles ſubſiſting in England. The inconveniencies of which, when granted out to private ſubjects, the lordly barons of thoſe times, were ſeverely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of king Stephen, "*erant in Anglia quodammodo tot reges vel potius tyranni, quot* "*domini caſtellorum:*" but it was felt by none more ſenſibly than by two ſucceeding princes, king John and king Henry III. And therefore, the greateſt part of them being demoliſhed in the barons' wars, the kings of after-times have been very cautious of ſuffering them to be rebuilt in a fortified manner: and ſir Edward Coke lays it down [e], that no ſubject can build a caſtle, or houſe of ſtrength imbattled, or other fortreſs defenſible, without the licence of the king; for the danger which might enſue, if every man at his pleaſure might do it.

IT is partly upon the ſame, and partly upon a fiſcal foundation, to ſecure his marine revenue, that the king has the

[b] 2 Inſt. 30.
[c] Cowel's Interp. *tit. caſtellorum operatio.* Seld. *Jan. Ang.* 1. 42.
[d] 2 Inſt. 31.
[e] 1 Inſt. 5.

prerogative of appointing *ports* and *havens*, or ſuch places only, for perſons and merchandize to paſs into and out of the realm, as he in his wiſdom ſees proper. By the feodal law all navigable rivers and havens were computed among the *regalia* [f], and were ſubject to the ſovereign of the ſtate. And in England it hath always been holden, that the king is lord of the whole ſhore [g], and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm [h]: and therefore, ſo early as the reign of king John, we find ſhips ſeiſed by the king's officers for putting in at a place that was not a legal port [i]. Theſe legal ports were undoubtedly at firſt aſſigned by the crown; ſince to each of them a court of portmote is incident [k], the juriſdiction of which muſt flow from the royal authority: the *great ports* of the ſea are alſo referred to, as well known and eſtabliſhed, by ſtatute 4 Hen. IV. c. 20. which prohibits the landing elſewhere under pain of confiſcation: and the ſtatute 1 Eliz. c. 11. recites, that the franchiſe of lading and diſcharging had been frequently granted by the crown.

But though the king had a power of granting the franchiſe of havens and ports, yet he had not the power of reſumption, or of narrowing and confining their limits when once eſtabliſhed; but any perſon had a right to load or diſcharge his merchandize in any part of the haven: whereby the revenue of the cuſtoms was much impaired and diminiſhed, by fraudulent landings in obſcure and private corners. This occaſioned the ſtatutes of 1 Eliz. c. 11. and 13 and 14 Car. II. c. 11. § 14. which enable the crown by commiſſion to aſcertain the limits of all ports, and to aſſign proper wharfs and quays in each port, for the excluſive landing and loading of merchandize.

The erection of beacons, light-houſes, and ſea-marks, is alſo a branch of the royal prerogative: whereof the firſt was

f 2 *Feud.* t. 56. Crag. 1. 15. 15.
g F. N. B. 113.
h Dav. 9. 56.
i Madox. hiſt. exch. 530.
k 4 Inſt. 148.

antiently

antiently uſed in order to alarm the country, in caſe of the approach of an enemy; and all of them are ſignally uſeful in guiding and preſerving veſſels at ſea by night as well as by day. For this purpoſe the king hath the excluſive power, by commiſſion under his great ſeal [l], to cauſe them to be erected in fit and convenient places [m], as well upon the lands of the ſubject as upon the demeſnes of the crown: which power is uſually veſted by letters patent in the office of lord high admiral [n]. And by ſtatute 8 Eliz. c. 13. the corporation of the trinity-houſe are empowered to ſet up any beacons or ſea-marks wherever they ſhall think them neceſſary; and if the owner of the land or any other perſon ſhall deſtroy them, or ſhall take down any ſteeple, tree, or other known ſea-mark, he ſhall forfeit 100*l*, or in caſe of inability to pay it, ſhall be *ipſo facto* outlawed.

To this branch of the prerogative may alſo be referred the power veſted in his majeſty, by ſtatutes 12 Car. II. c. 4. and 29 Geo. II. c. 16. of prohibiting the exportation of arms or ammunition out of this kingdom, under ſevere penalties: and likewiſe the right which the king has, whenever he ſees proper, of confining his ſubjects to ſtay within the realm, or of recalling them when beyond the ſeas. By the common law [o], every man may go out of the realm for whatever cauſe he pleaſeth, without obtaining the king's leave; provided he is under no injunction of ſtaying at home: (which liberty was expreſsly declared in king John's great charter, though left out in that of Henry III) but, becauſe that every man ought of right to defend the king and his realm, therefore the king at his pleaſure may command him by his writ that he go not beyond the ſeas, or out of the realm, without licence; and, if he do the contrary, he ſhall be puniſhed for diſobeying the king's command. Some perſons there antiently were, that, by reaſon of their ſtations, were under a perpetual prohibition of going abroad without licence obtained; among which were

[l] 3 Inſt. 204. 4 Inſt. 148.
[m] *Rot. Claus.* 1 *Ric. II. m.* 42. Pryn. on 4 Inſt. 136.
[n] Sid. 158. 4 Inſt. 149.
[o] F. N. B. 85.

reckoned all peers, on account of their being counſellors of
[266] the crown; all knights, who were bound to defend the kingdom from invaſions; all eccleſiaſtics, who were expreſsly confined by the fourth chapter of the conſtitutions of Clarendon, on account of their attachment in the times of popery to the ſee of Rome; all archers and other artificers, leſt they ſhould inſtruct foreigners to rival us in their ſeveral trades and manufactures. This was law in the times of Britton [p], who wrote in the reign of Edward I: and ſir Edward Coke [q] gives us many inſtances to this effect in the time of Edward III. In the ſucceeding reign the affair of travelling wore a very different aſpect: an act of parliament being made [r], forbidding all perſons whatever to go abroad without licence; *except* only the lords and other great men of the realm; and true and notable merchants; and the king's ſoldiers. But this act was repealed by the ſtatute 4 Jac. I. c. 1. And at preſent every body has, or at leaſt aſſumes, the liberty of going abroad when he pleaſes. Yet undoubtedly if the king, by writ of *ne exeat regnum* (10), under his great ſeal or privy ſeal,

[p] c. 123. [q] 3 Inſt. 175. [r] 5 Ric. II. c. 2.

(10) It is ſaid in lord Bacon's Ordinances, n° 89, that "towards "the latter end of the reign of king James the firſt this writ was "thought proper to be granted, not only in reſpect of attempts "prejudicial to the king and ſtate, (in which caſe the lord chan-"cellor granted it on application from any of the principal ſecre-"taries, without ſhewing cauſe, or upon ſuch information as his "lordſhip ſhould think of weight,) but alſo in the caſe of inter-"lopers in trade, great bankrupts, in whoſe eſtates many ſubjects "might be intereſted, in duels, and in other caſes that did con-"cern multitudes of the king's ſubjects."

But in the year 1734, lord Chancellor Talbot declared that "in his experience he never knew this writ of *ne exeat regnum* "granted or taken out, without a bill firſt filed.—It is true, it "was originally a ſtate writ, but for ſome time, though not very "long, it has been made uſe of in aid of the ſubjects for the help-"ing of them to juſtice; but it ought not to be made uſe of where "the demand is entirely at law, for there the plaintiff has bail, "and he ought not to have double bail, both in law and equity." 3 *P. Wms.* 312.

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thinks proper to prohibit him from ſo doing; or if the king ſends a writ to any man, when abroad, commanding his return (11), and in either caſe the ſubject diſobeys; it is a high contempt of the king's prerogative, for which the offender's lands ſhall be ſeiſed till he return; and then he is liable to fine and impriſonment [s].

III. ANOTHER capacity, in which the king is conſidered in domeſtic affairs, is as the fountain of juſtice and general conſervator of the peace of the kingdom. By the fountain of juſtice the law does not mean the *author* or *original*, but only the *diſtributor*. Juſtice is not derived from the king, as from his *free gift*; but he is the ſteward of the public, to diſpenſe it to whom it is *due* [t]. He is not the ſpring, but the reſervoir; from whence right and equity are conducted, by a thouſand channels, to every individual. The original power

[s] 1 Hawk. P. C. 22.

[t] *Ad hoc autem creatus eſt et electus, ut juſtitiam faciat univerſis.* Bract. *l.* 3. *tr.* 1. *c.* 9.

The uſe and object of this writ of *ne exeat regno* in chancery at preſent is exactly the ſame as an arreſt at law in the commencement of an action, viz. to prevent the party from withdrawing his perſon and property beyond the juriſdiction of the court, before a judgment could be obtained and carried into execution; ſo where there is a ſuit in equity for a demand, for which the defendant cannot be arreſted in an action at law, upon an affidavit made that there is reaſon to apprehend that he will leave the kingdom before the concluſion of the ſuit, the chancellor by this writ will ſtop him, and will commit him to priſon, unleſs he produces ſufficient ſureties that he will abide the event of the ſuit. See 2 *Com. Dig.* 312. The affidavit muſt ſtate ſufficient proof of the intention of the party to go abroad, and the plaintiff muſt ſwear that the defendant is indebted to him a certain ſum, which ſum is marked upon the writ, and for which ſecurity muſt be found. 3 *Bro.* 350. And if this ſum is paid into court, the writ will be diſcharged. 1 *Veſ. Jun.* 96.

(11) The exerciſe of this prerogative has been long diſuſed, and it is probable that it will never be reſumed. For the ancient learning upon it, ſee 3 Inſt. c. 84. againſt fugitives.

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of judicature, by the fundamental principles of ſociety, is
[267] lodged in the ſociety at large: but as it would be impracti-
cable to render complete juſtice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain ſelect magiſtrates, who with more eaſe and expedition can hear and determine complaints; and in England this authority has immemorially been exerciſed by the king or his ſubſtitutes. He therefore has alone the right of erecting courts of judicature: for, though the conſtitution of the kingdom hath intruſted him with the whole executive power of the laws, it is impoſſible, as well as improper, that he ſhould perſonally carry into execution this great and extenſive truſt: it is conſequently neceſſary, that courts ſhould be erected, to aſſiſt him in executing this power; and equally neceſſary, that, if erected, they ſhould be erected by his authority. And hence it is, that all juriſdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they paſs under his ſeal, and are executed by his officers.

IT is probable, and almoſt certain, that in very early times, before our conſtitution arrived at it's full perfection, our kings in perſon often heard and determined cauſes between party and party (12). But at preſent, by the long and uniform uſage of many ages, our kings have delegated their whole judicial power to the judges of their ſeveral courts; which are the grand depoſitaries of the fundamental laws of the kingdom, and have gained a known and ſtated juriſdiction, regulated by certain and eſtabliſhed rules, which the crown itſelf cannot now alter but by act of parliament [u]. And, in order to maintain both the dignity and independence of the judges in the ſuperior courts, it is enacted by the ſtatute 13 W. III. c. 2. that their commiſſions ſhall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene ſe geſſerint*, and their ſalaries aſcertained and eſtabliſhed; but that it may be lawful to remove them on the addreſs of both houſes of parliament. And

[u] 2 Hawk. P. C. 2.

(12) See 3 vol. 41.

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now, by the noble improvements of that law in the ſtatute of 1 Geo. III. c. 23, enacted at the earneſt recommendation of the king himſelf from the throne, the judges are continued in [268] their offices during their good behaviour, notwithſtanding any demiſe of the crown, (which was formerly held [w] immediately to vacate their ſeats,)(13) and their full ſalaries are abſolutely ſecured to them during the continuance of their commiſſions; his majeſty having been pleaſed to declare, that "he looked upon the independence and uprightneſs of "the judges, as eſſential to the impartial adminiſtration of "juſtice; as one of the beſt ſecurities of the rights and li-"berties of his ſubjects; and as moſt conducive to the "honour of the crown [x]."

IN criminal proceedings, or proſecutions for offences, it would ſtill be a higher abſurdity, if the king perſonally ſate in judgment; becauſe in regard to theſe he appears in another capacity, that of *proſecutor*. All offences are either againſt the king's peace, or his crown and dignity: and are ſo laid in every indictment. For though in their conſequences they generally ſeem (except in the caſe of treaſon, and a very few others) to be rather offences againſt the kingdom than the king; yet, as the public, which is an inviſible body, has delegated all it's power and rights, with regard to the execu-

[w] Lord Raym. 747. [x] Com. Journ. 3 Mar. 1761.

(13) All their commiſſions became vacant upon the demiſe of the crown, till they were continued for ſix months longer by 1 Ann. ſtat. 1. c. 8. When his majeſty was pleaſed to make the memorable declaration in the text, he introduced it by obſerving; "Upon granting new commiſſions to the judges, the preſent ſtate "of their offices fell naturally under conſideration. In conſe-"quence of the late act, paſſed in the reign of my late glorious "predeceſſor William the third, for ſettling the ſucceſſion to the "crown in my family, their commiſſions have been made during "their good behaviour; but notwithſtanding that wiſe proviſion, "their offices have determined upon the demiſe of the crown, or "at the expiration of ſix months afterwards in every inſtance of "that nature which has happened."

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tion of the laws, to one viſible magiſtrate, all affronts to that power, and breaches of thoſe rights, are immediately offences againſt him, to whom they are ſo delegated by the public. He is therefore the proper perſon to proſecute for all public offences and breaches of the peace, being the perſon injured in the eye of the law. And this notion was carried ſo far in the old Gothic conſtitution, (wherein the king was bound by his coronation oath to conſerve the peace,) that in caſe of any forcible injury offered to the perſon of a fellow ſubject, the offender was accuſed of a kind of perjury, in having violated the king's coronation oath; *dicebatur fregiſſe juramentum regis juratum*[y]. And hence alſo ariſes another
[269] branch of the prerogative, that of *pardoning* offences; for it is reaſonable that he only who is injured ſhould have the power of forgiving. Of proſecutions and pardons I ſhall treat more at large hereafter; and only mention them here, in this curſory manner, to ſhew the conſtitutional grounds of this power of the crown, and how regularly connected all the links are in this vaſt chain of prerogative.

IN this diſtinct and ſeparate exiſtence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleaſure, by the crown, conſiſts one main preſervative of the public liberty; which cannot ſubſiſt long in any ſtate, unleſs the adminiſtration of common juſtice be in ſome degree ſeparated both from the legiſlative and alſo from the executive power. Were it joined with the legiſlative, the life, liberty, and property of the ſubject would be in the hands of arbitrary judges, whoſe deciſions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legiſlators may depart from, yet judges are bound to obſerve. Were it joined with the executive, this union might ſoon be an over-balance for the legiſlative. For which reaſon, by the ſtatute of 16 Car. I. c. 10. which aboliſhed the court of ſtar-chamber,

[y] Stiernh. *de jure Goth. l.* 3. *c.* 3. A notion ſomewhat ſimilar to this may be found in the mirror. c. 1. § 5. And ſo alſo, when the chief juſtice Thorpe was condemned to be hanged for bribery, he was ſaid *ſacramentum domini regis fregiſſe. Rot. Parl.* 25 *Edw. III.*

effectual

effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent inſtances, might ſoon be inclined to pronounce that for law, which was moſt agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free conſtitution, than uniting the provinces of a judge and a miniſter of ſtate. And indeed, that the abſolute power, claimed and exerciſed in a neighbouring nation, is more tolerable than that of the eaſtern empires, is in great meaſure owing to their having veſted the judicial power in their parliaments, a body ſeparate and diſtinct from both the legiſlative and executive: and, if ever that nation recovers it's former liberty, it will owe it to the efforts of thoſe aſſemblies. In Turkey, where every thing is centered in the ſultan or his miniſters, deſpotic power is in it's meridian, and wears [270] a more dreadful aſpect.

A CONSEQUENCE of this prerogative is the legal *ubiquity* of the king. His majeſty, in the eye of the law, is always preſent in all his courts, though he cannot perſonally diſtribute juſtice [z]. His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal perſon, that is always preſent in court, always ready to undertake proſecutions, or pronounce judgment, for the benefit and protection of the ſubject. And from this ubiquity it follows, that the king can never be nonſuit [a]; for a nonſuit is the deſertion of the ſuit or action by the non-appearance of the plaintiff in court (14). For the ſame reaſon alſo, in the forms of legal proceedings, the king is not ſaid to appear *by his attorney*, as other men do; for in contemplation of law he is always preſent in court [b].

FROM the ſame original, of the king's being the fountain of juſtice, we may alſo deduce the prerogative of iſſuing proclamations, which is veſted in the king alone. Theſe pro-

[z] Forteſc. c. 8. 2 Inſt. 186. [a] Co. Litt. 139. [b] Finch. L. 81.

(14) But the attorney-general may enter a *non vult proſequi*, which has the effect of a nonſuit. *Co. Litt.* 139.

clamations

clamations have then a binding force, when (as ſir Edward Coke obſerves [c]) they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a diſtinct part, the legiſlative branch, of the ſovereign power, yet the manner, time, and circumſtances of putting thoſe laws in execution muſt frequently be left to the diſcretion of the executive magiſtrate. And therefore his conſtitutions or edicts concerning theſe points, which we call proclamations, are binding upon the ſubject, where they do not either contradict the old laws or tend to eſtabliſh new ones; but only enforce the execution of ſuch laws as are already in being, in ſuch manner as the king ſhall judge neceſſary. Thus the eſtabliſhed law is, that the king may prohibit any of his ſubjects from leaving the realm: a proclamation therefore forbidding this in general for three weeks,
[271] by laying an embargo upon all ſhipping in time of war [d], will be equally binding as an act of parliament, becauſe founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all veſſels laden with wheat (though in the time of a public ſcarcity) being contrary to law, and particularly to ſtatute 22 Car. II. c. 13. the adviſers of ſuch a proclamation, and all perſons acting under it, found it neceſſary to be indemnified by a ſpecial act of parliament, 7 Geo. III. c. 7. A proclamation for diſarming papiſts is alſo binding, being only in execution of what the legiſlature has firſt ordained: but a proclamation for allowing arms to papiſts, or for diſarming any proteſtant ſubjects, will not bind; becauſe the firſt would be to aſſume a diſpenſing power, the latter a legiſlative one; to the veſting of either of which in any ſingle perſon the laws of England are abſolutely ſtrangers. Indeed by the ſtatute 31 Hen. VIII. c. 8. it was enacted, that the king's proclamations ſhould have the force of acts of parliament: a ſtatute, which was calculated to introduce the moſt deſpotic tyranny; and which muſt have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his ſucceſſor, about five years after [e].

IV. THE king is likewiſe the fountain of honour, of office, and of privilege: and this in a different ſenſe from that

[c] 3 Inſt. 162. [d] 4 Mod. 177. 179. [e] Stat. 1 Edw. VI. c. 12.

wherein

wherein he is ſtiled the fountain of juſtice; for here he is really the parent of them. It is impoſſible that government can be maintained without a due ſubordination of rank; that the people may know and diſtinguiſh ſuch as are ſet over them, in order to yield them their due reſpect and obedience; and alſo that the officers themſelves, being encouraged by emulation and the hopes of ſuperiority, may the better diſcharge their functions: and the law ſuppoſes, that no one can be ſo good a judge of their ſeveral merits and ſervices, as the king himſelf who employs them. It has therefore intruſted with him the ſole power of conferring dignities and honours, in confidence that he will beſtow them upon none, but ſuch as deſerve them. And therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown: either expreſſed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal inveſtiture, as in the creation of a ſimple knight. [272]

FROM the ſame principle alſo ariſes the prerogative of erecting and diſpoſing of offices: for honours and offices are in their nature convertible and ſynonymous. All offices under the crown carry in the eye of the law an honour along with them; becauſe they imply a ſuperiority of parts and abilities, being ſuppoſed to be always filled with thoſe that are moſt able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them: an earl, *comes*, was the conſervator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the ſame reaſon therefore that honours are in the diſpoſal of the king, offices ought to be ſo likewiſe; and as the king may create new titles, ſo may he create new offices: but with this reſtriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the ſubject, which cannot be impoſed but by act of parliament[f]. Wherefore, in 13 Hen. IV, a new office being created by the king's

[f] 2 Inſt. 533.

letters patent for meaſuring cloths, with a new fee for the ſame, the letters patent were, on account of the new fee, revoked and declared void in parliament.

UPON the ſame, or a like reaſon, the king has alſo the prerogative of conferring privileges upon private perſons. Such as granting place or precedence to any of his ſubjects(15), as ſhall ſeem good to his royal wiſdom[z]: or ſuch as converting aliens, or perſons born out of the king's dominions, into denizens; whereby ſome very conſiderable privileges of natural-born ſubjects are conferred upon them. Such alſo is the prerogative of erecting corporations; whereby a number of private perſons are united and knit together, and enjoy many liberties, powers, and immunities in their politic ca-
[273] pacity, which they were utterly incapable of in their natural. Of aliens, denizens, natural-born, and naturalized ſubjects, I ſhall ſpeak more largely in a ſubſequent chapter; as alſo of corporations at the cloſe of this book of our commentaries. I now only mention them incidentally, in order to remark the king's prerogative of making them; which is grounded upon this foundation, that the king, having the ſole adminiſtration of the government in his hands, is the beſt and the only judge, in what capacities, with what privileges, and under what diſtinctions, his people are the beſt qualified to ſerve, and to act under him. A principle, which was carried ſo far by the imperial law, that it was determined to be the crime of ſacrilege, even to doubt

[z] 4 Inſt. 361.

(15) The king by the common law could have created a duke, earl, &c. and could have given him precedence before all others of the ſame rank, a prerogative not unfrequently exerciſed in ancient times; but it was reſtrained by the 31 Hen. VIII. c. 10. which ſettles the place or precedence of all the nobility and great officers of ſtate. This ſtatute does not extend to Ireland, where the king ſtill retains his prerogative without any reſtriction, except the dread of the unpopularity which would now reſult from the exertion of it.

whether the prince had appointed proper officers in the ſtate[h].

V. ANOTHER light, in which the laws of England conſidered the king with regard to domeſtic concerns, is as the arbiter of commerce. By commerce, I at preſent mean domeſtic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, it's privileges, regulations, and reſtrictions; and would be alſo quite beſide the purpoſe of theſe commentaries, which are confined to the laws of England: whereas no municipal laws can be ſufficient to order and determine the very extenſive and complicated affairs of traffic and merchandize; neither can they have a proper authority for this purpoſe. For, as theſe are tranſactions carried on between ſubjects of independent ſtates, the municipal laws of one will not be regarded by the other. For which reaſon the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the cauſes of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domeſtic trade, as for inſtance with regard to the drawing, the acceptance, and the tranſfer, of inland bills of exchange[i].

WITH us in England, the king's prerogative, ſo far as it [274] relates to mere domeſtic commerce, will fall principally under the following articles:

FIRST, the eſtabliſhment of public marts, or places of buying and ſelling, ſuch as markets and fairs, with the tolls thereunto belonging. Theſe can only be ſet up by virtue of the king's grant, or by long and immemorial uſage and preſcription, which preſuppoſes ſuch a grant[k]. The limitation of theſe public reſorts, to ſuch time and ſuch place as may be

[h] *Diſputare de principali judicio non oportet; ſacrilegii enim inſtar eſt, dubitare an is dignus ſit, quem elegerit imperator.* C. 9. 29. 3.

[i] Co. Litt. 172. Ld. Raym. 181. 1542.

[k] 2 Inſt. 220.

moſt convenient for the neighbourhood, forms a part of oeconomics, or domeſtic polity; which, conſidering the kingdom as a large family, and the king as the maſter of it, he clearly has a right to diſpoſe and order as he pleaſes.

SECONDLY, the regulation of weights and meaſures. Theſe, for the advantage of the public, ought to be univerſally the ſame throughout the kingdom; being the general criterions which reduce all things to the ſame or an equivalent value. But, as weight and meaſure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to ſome fixed rule or ſtandard: which ſtandard it is impoſſible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is therefore neceſſary to have recourſe to ſome viſible, palpable, material ſtandard; by forming a compariſon with which, all weights and meaſures may be reduced to one uniform ſize: and the prerogative of fixing this ſtandard our antient law veſted in the crown, as in Normandy it belonged to the duke[l]. This ſtandard was originally kept at Wincheſter: and we find in the laws of king Edgar[m], near a century before the conqueſt, an injunction that the one meaſure, which was kept at Wincheſter, ſhould be obſerved throughout the realm. Moſt nations have regulated the ſtandard of meaſures of length by
[275] compariſon with the parts of the human body; as the palm, the hand, the ſpan, the foot, the cubit, the ell, (*ulna*, or arm,) the pace, and the fathom. But, as theſe are of different dimenſions in men of different proportions, our antient hiſtorians[n] inform us, that a new ſtandard of longitudinal meaſure was aſcertained by king Henry the firſt; who commanded that the *ulna* or antient ell, which anſwers to the modern yard, ſhould be made of the exact length of his own arm. And, one ſtandard of meaſures of length being gained, all others are eaſily derived from thence; thoſe of greater length by multiplying, thoſe of leſs by ſubdividing, that ori-

[l] *Gr. Conſuet. c.* 16.
[m] *cap.* 8.
[n] Will. Malmſb. *in vita Hen. I.* Speln. *Hen. I. apud* Wilkins. 299.

ginal ſtandard. Thus, by the ſtatute called *compoſitio ulnarum et perticarum*, five yards and a half make a perch; and the yard is ſubdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley. Superficial meaſures are derived by ſquaring thoſe of length; and meaſures of capacity by cubing them. The ſtandard of weights was originally taken from corns of wheat, whence the loweſt denomination of weights we have is ſtill called a grain; thirty-two of which are directed, by the ſtatute called *compoſitio menſurarum*, to compoſe a penny weight, whereof twenty make an ounce, twelve ounces a pound, and ſo upwards. And upon theſe principles the firſt ſtandards were made; which, being originally ſo fixed by the crown, their ſubſequent regulations have been generally made by the king in parliament. Thus, under king Richard I, in his parliament holden at Weſtminſter, *A. D.* 1197, it was ordained that there ſhould be only one weight and one meaſure throughout the kingdom, and that the cuſtody of the aſſiſe or ſtandard of weights and meaſures ſhould be committed to certain perſons in every city and borough [o]; from whence the antient office of the king's aulnager ſeems to have been derived, whoſe duty it was, for a certain fee, to meaſure all cloths made for ſale, till the office was aboliſhed by the ſtatute 11 & 12 W. III. c. 20. In king John's time this ordinance of king Richard was frequently diſpenſed with for money [p]; which occaſioned a [276]
proviſion to be made for enforcing it, in the great charters of king John and his ſon [q]. Theſe original ſtandards were called *pondus regis* [r], and *menſura domini regis* [s]; and are directed by a variety of ſubſequent ſtatutes to be kept in the exchequer, and all weights and meaſures to be made conformable thereto [t]. But, as ſir Edward Coke obſerves [u], though this hath ſo often by authority of parliament been

[o] Hoved. Matth. Paris.
[p] Hoved. *A. D.* 1201.
[q] 9 Hen. III. c. 25.
[r] *Plac.* 35 *Edw. I. apud* Cowel's Interpr. *tit. pondus regis.*
[s] *Flet.* 2. 12.
[t] 14 Edw. III. ſt. 1. c. 12. 25 Edw. III. ſt. 5. c. 10. 16 Ric. II. c. 3. 8 Hen. VI. c. 5. 11 Hen. VI. c. 8. 21 Hen. VII. c. 4. 22 Car. II. c. 8.
[u] 2 Inſt. 41.

enacted, yet it could never be effected; ſo forcible is cuſtom with the multitude (16).

THIRDLY, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domeſtic commerce, to give it authority or make it current. Money is an univerſal medium, or common ſtandard, by compariſon with which the value of all merchandize may be aſcertained: or it is a ſign, which repreſents the reſpective values of all commodities. Metals are well calculated for this ſign, becauſe they are durable and are capable of many ſubdiviſions: and a precious metal is ſtill better calculated for this purpoſe, becauſe it is the moſt portable. A metal is alſo the moſt proper for a common meaſure, becauſe it can eaſily be reduced to the ſame ſtandard in all nations: and every particular nation fixes on it it's own impreſſion, that the weight and ſtandard (wherein conſiſts the intrinſic value) may both be known by inſpection only.

As the quantity of precious metals increaſes, that is, the more of them there is extracted from the mine, this univerſal

(16) The regulation of weights and meaſures cannot with propriety be referred to the king's prerogative; for from *magna charta* to the preſent time there are above twenty acts of parliament to fix and eſtabliſh the ſtandard and uniformity of weights and meaſures. Two important caſes upon this ſubject have lately been determined by the court of king's bench; one was, that although there had been a cuſtom in a town to ſell butter by eighteen ounces to the pound, yet the jury of the court-leet were not juſtified in ſeizing the butter of a perſon who ſold pounds leſs than that, but more than ſixteen ounces each, the ſtatutable weight. 3 *T. R.* 271. In the other it was determined, that no practice or uſage could countervail the ſtatutes 22 Car. II. c. 8. and 22 & 23 Car. II. c. 12. which enact, that if any perſon ſhall either ſell or buy grain or ſalt by any other meaſure than the Winchester buſhel, he ſhall forfeit forty ſhillings, and alſo the value of the grain or ſalt ſo ſold or bought; one half to the poor, the other to the informer. *The King and Major*, 4 *T. R.* 750. 5 *T. R.* 353.

medium or common ſign will ſink in value, and grow leſs precious. Above a thouſand millions of bullion are calculated to have been imported into Europe from America within leſs than three centuries; and the quantity is daily increaſing. The conſequence is, that more money muſt be given now for the ſame commodity than was given an hundred years [277] ago. And, if any accident were to diminiſh the quantity of gold and ſilver, their value would proportionably riſe. A horſe, that was formerly worth ten pounds, is now perhaps worth twenty; and, by any failure of current ſpecie, the price may be reduced to what it was. Yet is the horſe in reality neither dearer nor cheaper at one time than another: for, if the metal which conſtitutes the coin was formerly twice as ſcarce as at preſent, the commodity was then as dear at half the price, as now it is at the whole (17).

(17) In conſidering the prices of articles in antient times, regard muſt always be had to the weight of the ſhilling, or the quantity of ſilver which it contained at different periods. From the conqueſt till the 20th year of Edw. III. a pound ſterling was actually a pound troy weight of ſilver, which was divided into twenty ſhillings; ſo if ten pounds at that time were the price of a horſe, the ſame quantity of ſilver was paid for it as is now given, if it's price is thirty pounds.

This therefore is one great cauſe of the apparent difference in the prices of commodities in antient and modern times. About the year 1347, Edw. III. coined twenty-two ſhillings out of a pound; and five years afterwards he coined twenty-five ſhillings out of the ſame quantity. Henry V. in the beginning of his reign, divided the pound into thirty ſhillings, and then of conſequence each ſhilling was double the weight of a ſhilling at preſent. Henry VII. increaſed the number to forty, which was the ſtandard number till the beginning of the reign of Elizabeth. She then coined a pound of ſterling ſilver into ſixty-two ſhillings, which diviſion has ever ſince remained without alteration; ſo every ounce of coined ſilver ſince that time has been equal to five ſhillings and two-pence. (*See* MONEY *in the Index to* Hume's *Hiſt.*) Dr. Adam Smith, at the end of his firſt volume, has given tables ſpecifying the average prices of wheat for five hundred and fifty years back, and has reduced for each year the money of that time into the money of the preſent day. But in his calculation he has

THE coining of money is in all ſtates the act of the ſovereign power; for the reaſon juſt mentioned, that it's value may be known on inſpection. And with reſpect to coinage in general, there are three things to be conſidered therein; the materials, the impreſſion, and the denomination.

WITH regard to the materials, ſir Edward Coke lays it down[w], that the money of England muſt either be of gold

[w] 2 Inſt. 577.

called the pound ſince Elizabeth's time ſixty ſhillings. Taking it at that rate, we may eaſily find the equivalent in modern money of any ſum in antient time, if we know the number of ſhillings which weighed a pound, by this ſimple rule: As the number of ſhillings in a pound at that time is to ſixty, ſo is any ſum at that time to it's equivalent at preſent; as for inſtance, in the time of Hen. V. as thirty ſhillings are to ſixty ſhillings now, ſo ten pouuds then were equal to twenty pounds of preſent money. The increaſe in the quantity of the precious metals does not neceſſarily increaſe the price of articles of commerce; for if the quantities of theſe articles are augmented in the ſame proportion as the quantity of money, it is clear there will be the ſame uſe, demand, or price for money as before, and no effect will be produced in the price of commodities.

If gold and ſilver could have been kept in the country, the immenſe increaſe of paper currency, or ſubſtitution of paper for coin, would have diminiſhed it's value, and have increaſed the prices of labour and commodities far beyond the effect that has been produced by the diſcovery of the mines in America. The effect they have produced is general, and extended to the whole world; but the increaſe of our paper has only a tendency to leſſen the value of money at home, which never can take place to any great degree, as it will naturally ſeek a better market, or be carried where more will be given for it; and by the ſubſtitution of a cheaper medium of commerce, the difference in value is added to the capital or to the real ſtrength of the nation. Gold and ſilver form an inſignificant part of the real wealth of a commercial country. The whole quantity of ſpecie has been eſtimated at about twenty millions only, not much more than what is raiſed in one year for the ſupport of government.

OR

or ſilver: and none other was ever iſſued by the royal authority till 1672, when copper farthings and half-pence were coined by king Charles the ſecond, and ordered by proclamation to be current in all payments, under the value of ſixpence, and not otherwiſe. But this copper coin is not upon the ſame footing with the other in many reſpects, particularly with regard to the offence of counterfeiting it. And, as to the ſilver coin, it is enacted by ſtatute 14 Geo. III. c. 42. that no tender of payment in ſilver money, exceeding twenty-five pounds at one time, ſhall be a ſufficient tender in law, for more than it's value by weight, at the rate of 5*s.* 2*d.* an ounce (18).

As to the impreſſion, the ſtamping thereof is the unqueſtionable prerogative of the crown: for, though divers biſhops and monaſteries had formerly the privilege of coining money, yet, as ſir Matthew Hale obſerves [w], this was uſually done by ſpecial grant from the king, or by preſcription which ſuppoſes one; and therefore was derived from, and not in [278] derogation of, the royal prerogative. Beſides that they had only the profit of the coinage, and not the power of inſtituting either the impreſſion or denomination; but had uſually the ſtamp ſent them from the exchequer.

THE denomination, or the value for which the coin is to paſs current, is likewiſe in the breaſt of the king; and, if any unuſual pieces are coined, that value muſt be aſcertained by proclamation. In order to fix the value, the weight and the fineneſs of the metal are to be taken into conſideration together. When a given weight of gold or ſilver is of a given fineneſs, it is then of the true ſtandard [x], and called

[w] 1 Hiſt. P. C. 191.

[x] This ſtandard hath been frequently varied in former times; but hath for many years paſt been thus invariably ſettled. The pound troy of gold, conſiſting of twenty-two carats (or twenty fourth parts) fine, and two of alloy, is divided into forty-four guineas and an

(18) This was a clauſe in a temporary act, which was continued till 1783, ſince which time I do not find that it has been revived.

eſterling or ſterling metal; a name for which there are various reaſons given[y], but none of them entirely ſatisfactory. And of this ſterling or eſterling metal all the coin of the kingdom muſt be made, by the ſtatute 25 Edw. III. c. 13. So that the king's prerogative ſeemeth not to extend to the debaſing or inhancing the value of the coin, below or above the ſterling value[z]: though ſir Matthew Hale[a] appears to be of another opinion (21). The king may alſo, by his proclama-

half of the preſent value of 21 *s.* each. And the pound troy of ſilver, conſiſting of eleven ounces and two-pennyweights pure, and eighteen pennyweights alloy, is divided into ſixty-two ſhillings. (See Folkes on Engliſh coins.) (19)

[y] Spelm. Gloſſ. 203. Dufreſne, III. 365. The moſt plauſible opinion ſeems to be that adopted by thoſe two etymologiſts, that the name was derived from the *Eſterlingi*, or Eaſterlings; as thoſe Saxons were antiently called, who inhabited that diſtrict of Germany, now occupied by the Hanſe-towns and their appendages; the earlieſt traders in modern Europe (20).

[z] 2 Inſt. 577.

[a] 1 Hal. P. C. 194.

(19) Dr. Adam Smith, in his ineſtimable work, the Inquiry into the Nature and Cauſes of the Wealth of Nations, 1 vol 39. tells us, that the "Engliſh pound ſterling in the time of Edw. I. contained "a pound Tower-weight of ſilver of a known fineneſs. The "Tower pound ſeems to have been ſomething more than the Roman "pound, and ſomething leſs than the Troyes pound. This laſt was "not introduced into the mint of England till the 18th of Hen. "VIII. The French livre contained in the time of Charlemagne "a pound Troyes weight of ſilver of a known fineneſs. The fair "of Troyes in Champaign was at that time frequented by all the "nations of Europe, and the weights and meaſures of ſo famous "a market were generally known and eſteemed."

(20) Camden, in his deſcription of Scotland, ſays, that it has been erroneouſly ſuppoſed that the word ſterling comes from Stirling in Scotland. *A Germanis enim, quos Angli Eſterlingi ab orientali ſitu vocarunt, facta eſt appellatio, quos Johannes rex ad argentum in ſuam puritatem redigendum primus evocavit, et ejuſmodi nummis Eſterlingi in antiquis ſcriptis ſemper concipiuntur.* P. 11.

(21) Lord Hale refers to the caſe of mixed money in Davies's Reports, 48. in ſupport of his opinion. A perſon in Ireland had borrowed 100*l.* of ſterling money, and had given a bond to repay it on a certain future day. In the mean time queen Eliz. for the purpoſe

tion, legitimate foreign coin, and make it current here; declaring at what value it ſhall be taken in payments[b]. But this, I apprehend, ought to be by compariſon with the ſtandard of our own coin; otherwiſe the conſent of parliament will be neceſſary. There is at preſent no ſuch legitimated money; Portugal coin being only current by private conſent, ſo that any one who pleaſes may refuſe to take it in [279] payment. The king may alſo at any time decry, or cry down, any coin of the kingdom, and make it no longer current[c] (22).

V. THE king is, laſtly, conſidered by the laws of England as the head and ſupreme governor of the national church.

To enter into the reaſons upon which this prerogative is founded is matter rather of divinity than of law. I ſhall therefore only obſerve that by ſtatute 26 Hen. VIII. c. 1. (reciting that the king's majeſty juſtly and rightfully is and ought to be the ſupreme head of the church of England; and ſo had been recognized by the clergy of this kingdom in their convocation) it is enacted, that the king ſhall be reputed the

[b] *Ibid.* 197. [c] 1 Hal. P. C. 197.

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purpoſe of paying her armies and creditors in Ireland, had coined mixed or baſe money, and by her proclamation had ordered it to paſs current, and had cried down the former coin. The debtor on the appointed day tendered 100*l.* in this baſe coin; and it was determined upon great conſideration that it was a legal tender, and that the lender was obliged to receive it: natural equity would have given a different deciſion.

This act of queen Elizabeth does but ill correſpond with the flattering inſcription upon her tomb: *Religio reformata, pax fundata, moneta ad ſuum valorem reducta, &c.* 2 Inſt. 578.

(22) All officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation 14 Geo. III. c 70. And by 15 Geo. III. c. 71. any perſon may cut counterfeit gold money, or what has been unlawfully diminiſhed.

only

only ſupreme head in earth of the church of England, and ſhall have annexed to the imperial crown of this realm, as well the title and ſtile thereof, as all juriſdictions, authorities, and commodities, to the ſaid dignity of ſupreme head of the church appertaining. And another ſtatute to the ſame purport was made, 1 Eliz. c. 1. (23)

IN virtue of this authority the king convenes, prorogues, reſtrains, regulates, and diſſolves all eccleſiaſtical ſynods or convocations. This was an inherent prerogative of the crown, long before the time of Henry VIII, as appears by the ſtatute 8 Hen. VI. c. 1. and the many authors, both lawyers and hiſtorians, vouched by ſir Edward Coke[d]. So that the ſtatute 25 Hen. VIII. c. 19. which reſtrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, cuſtoms, and ſtatutes of the realm, was merely declaratory of the old common law[e]: that part of it only being new, which makes the king's royal aſſent actually neceſſary to the validity of every canon. The convocation or eccleſiaſtical ſynod, in England, differs conſiderably in it's conſtitution from the ſynods of other chriſtian kingdoms: thoſe conſiſting wholly of biſhops; whereas with us the convocation is the miniature of a parliament, wherein the archbiſhop preſides with regal ſtate; [280] the upper houſe of biſhops repreſents the houſe of lords; and the lower houſe, compoſed of repreſentatives of the ſeveral

[d] 4 Inſt. 322, 323. [e] 12 Rep. 72.

(23) As queen Mary by 1 & 2 Ph. & M. c. 8. had repealed all the ſtatutes made in the time of her father derogatory to the ſee of Rome, and had fully reinſtated the pope in all his former power and juriſdiction in this country; queen Elizabeth, to ſhew her attachment to the proteſtant cauſe, by the firſt parliamentary act of her reign repealed this ſtatute of queen Mary, and revived all the ſtatutes relating to the church paſſed in the time of Henry VIII. This proves how little at that time depended upon the authority of parliament, which could accede to ſuch immenſe revolutions in the courſe of four or five years.

dioceſes

dioceſes at large, and of each particular chapter therein, reſembles the houſe of commons with it's knights of the ſhire and burgeſſes[f]. This conſtitution is ſaid to be owing to the policy of Edward I: who thereby at one and the ſame time let in the inferior clergy to the privileges of forming eccleſiaſtical canons, (which before they had not,) and alſo introduced a method of taxing eccleſiaſtical benefices, by conſent of convocation[g] (24).

f In the diet of Sweden, where the eccleſiaſtics form one of the branches of the legiſlature, the chamber of the clergy reſembles the convocation of England. It is compoſed of the biſhops and ſuperintendants; and alſo of deputies, one of which is choſen by every ten pariſhes or rural deanry. Mod. Un. Hiſt. xxxiii. 18.

g Gilb. Hiſt. of Exch. c. 4.

(24) From the learned Commentator's text, the ſtudent would perhaps be apt to ſuppoſe that there is only one convocation at a time. But the king, before the meeting of every new parliament, directs his writ to each archbiſhop, to ſummon a convocation in his peculiar province.

Godolphin ſays, that the convocation of the province of York conſtantly correſponds, debates, and concludes the ſame matters with the provincial ſynod of Canterbury, *God.* 99. But they are certainly diſtinct and independent of each other; and when they uſed to tax the clergy, the different convocations ſometimes granted different ſubſidies. In the 22 Hen. VIII. the convocation of Canterbury had granted the king one hundred thouſand pounds; in conſideration of which an act of parliament was paſſed, granting a free pardon to the clergy for all ſpiritual offences, but with a proviſo that it ſhould not extend to the province of York, unleſs it's convocation would grant a ſubſidy in proportion, or unleſs it's clergy would bind themſelves individually to contribute as bountifully. This ſtatute is recited at large in *Gib. Cod.* 77.

All deans and archdeacons are members of the convocation of their province; each chapter ſends one proctor or repreſentative, and the parochial clergy in each dioceſe in Canterbury two proctors; but on account of the ſmall number of dioceſes in the province of York, each archdeaconry elects two proctors. In York the convocation conſiſts only of one houſe; but in Canterbury there are two houſes, of which the twenty-two biſhops form the upper houſe; and before the reformation, abbots, priors, and other mitred

FROM this prerogative alſo, of being the head of the church, ariſes the king's right of nomination to vacant biſhopricks, and certain other eccleſiaſtical preferments; which will more properly be conſidered when we come to treat of the clergy. I ſhall only here obſerve, that this is now done in conſequence of the ſtatute 25 Hen. VIII. c. 20.

As head of the church, the king is likewiſe the *dernier reſort* in all eccleſiaſtical cauſes; an appeal lying ultimately to him in chancery from the ſentence of every eccleſiaſtical judge: which right was reſtored to the crown by ſtatute 25 Hen. VIII. c. 19. as will more fully be ſhewn hereafter (25).

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mitred prelates, ſat with the biſhops. The lower houſe of convocation in the province of Canterbury conſiſts of twenty-two deans, fifty-three archdeacons, twenty-four proctors for the chapters, and forty-four proctors for the parochial clergy. By 8 Hen. VI. c. 1. the clergy in their attendance upon the convocation have the ſame privilege in freedom from arreſt as the members of the houſe of commons in their attendance upon parliament. *Burn. Conv.* 1 *Bac. Abr.* 610.

(25) By that ſtatute it is declared, that for the future no appeals from the eccleſiaſtical courts of this realm ſhould be made to the pope, but that an appeal from the archbiſhop's courts ſhould lie to the king in chancery; upon which the king, as in appeals from the admiral's court, ſhould by a commiſſion appoint certain judges or delegates finally to determine ſuch appeals. 3 vol. 66.

CHAPTER THE EIGHTH.

OF THE KING'S REVENUE.

HAVING, in the preceding chapter, conſidered at large thoſe branches of the king's prerogative, which contribute to his royal dignity, and conſtitute the executive power of the government, we proceed now to examine the king's *fiſcal* prerogatives, or ſuch as regard his revenue; which the Britiſh conſtitution hath veſted in the royal perſon, in order to ſupport his dignity and maintain his power: being a portion which each ſubject contributes of his property, in order to ſecure the remainder.

THIS revenue is either ordinary, or extraordinary. The king's ordinary revenue is ſuch, as has either ſubſiſted time out of mind in the crown; or elſe has been granted by parliament, by way of purchaſe or exchange for ſuch of the king's inherent hereditary revenues, as were found inconvenient to the ſubject.

WHEN I ſay that it has ſubſiſted time out of mind in the crown, I do not mean that the king is at preſent in the actual poſſeſſion of the whole of this revenue. Much (nay, the greateſt part) of it is at this day in the hands of ſubjects; to whom it has been granted out from time to time by the kings of England: which has rendered the crown in ſome meaſure dependent on the people for it's ordinary ſupport and ſubſiſtence. So that I muſt be obliged to recount, as part of the royal revenue, what lords of manors and other ſubjects frequently look upon to be their own abſolute inherent rights; becauſe they are and have been veſted in them and their anceſtors for ages, though in reality originally derived from the grants of our antient princes.

I. THE

I. THE firſt of the king's ordinary revenues, which I ſhall take notice of, is of an eccleſiaſtical kind; (as are alſo the three ſucceeding ones;) viz. the cuſtody of the temporalties of biſhops: by which are meant all the lay revenues, lands, and tenements (in which is included his barony) which belong to an archbiſhop's or biſhop's ſee. And theſe upon the vacancy of the biſhoprick are immediately the right of the king, as a conſequence of his prerogative in church matters; whereby he is conſidered as the founder of all archbiſhopricks and biſhopricks, to whom during the vacancy they revert. And for the ſame reaſon, before the diſſolution of abbeys, the king had the cuſtody of the temporalties of all ſuch abbeys and priories as were of royal foundation (but not of thoſe founded by ſubjects) on the death of the abbot or prior [a]. Another reaſon may alſo be given, why the policy of the law hath veſted this cuſtody in the king; becauſe as the ſucceſſor is not known, the lands and poſſeſſions of the ſee would be liable to ſpoil and devaſtation, if no one had a property therein. Therefore the law has given the king, not the temporalties themſelves, but the *cuſtody* of the temporalties, till ſuch time as a ſucceſſor is appointed; with power of taking to himſelf all the intermediate profits, without any account of the ſucceſſor; and with the right of preſenting (which the crown very frequently exerciſes) to ſuch benefices and other preferments as fall within the time of vacation [b]. This revenue is of ſo high a nature, that it could not be granted out to a ſubject, before, or even after, it accrued: but now by the ſtatute 15 Edw. III. ſt. 4. c. 4 & 5. the king may, after the vacancy, leaſe the temporalties to the dean and chapter; ſaving to himſelf all advowſons, eſcheats, and the like. Our antient kings, and particularly William Rufus, were not only remarkable for keeping the biſhopricks a long time vacant, for the ſake of enjoying the temporalties, but alſo committed horrible waſte on the woods and other parts of the eſtate; and to crown all, would never, when the ſee was filled up, reſtore to the biſhop his temporalties again unleſs he purchaſed them at an exorbitant price. To remedy

[a] 2 Inſt. 15. [b] Stat. 17 Edw. II. c. 14. F. N. B. 32.

which,

which, king Henry the firſt [c] granted a charter at the beginning of his reign, promiſing neither to ſell, nor let to farm, nor take any thing from, the domains of the church, till the ſucceſſor was inſtalled (1). And it was made one of the articles of the great charter [d], that no waſte ſhould be committed in the temporalties of biſhopricks, neither ſhould the cuſtody of them be ſold. The ſame is ordained by the ſtatute of Weſtminſter the firſt [e]; and the ſtatute 14 Edw. III. ſt. 4. c. 4. (which permits, as we have ſeen, a leaſe to the dean and chapter) is ſtill more explicit in prohibiting the other exactions. It was alſo a frequent abuſe, that the king would for trifling, or no cauſes, ſeiſe the temporalties of biſhops, even during their lives, into his own hands: but this is guarded againſt by ſtatute 1 Edw. III. ſt. 2. c. 2.

THIS revenue of the king, which was formerly very conſiderable, is now by a cuſtomary indulgence almoſt reduced to nothing: for, at preſent, as ſoon as the new biſhop is conſecrated and confirmed, he uſually receives the reſtitution of his temporalties quite entire, and untouched, from the king; and at the ſame time does homage to his ſovereign: and then, and not ſooner, he has a fee-ſimple in his biſhoprick, and may maintain an action for the profits [f].

II. THE king is entitled to a corody, as the law calls it, out of every biſhoprick, that is, to ſend one of his chaplains to be maintained by the biſhop, or to have a penſion allowed him till the biſhop promotes him to a benefice [g]. This is alſo in the nature of an acknowlegement to the king, as founder of the ſee, ſince he had formerly the ſame corody or penſion from every abbey or priory of royal foundation. It is, I apprehend, now fallen into total diſuſe: though ſir Matthew

[c] Matt. Paris.
[d] 9 Hen. III. c. 5.
[e] 3 Edw. I. c. 21.
[f] Co. Litt. 67. 344.
[g] F. N. B. 230.

(1) But queen Elizabeth kept the ſee of Ely vacant 19 years, in order to retain the revenue. *Strype*, 4 vol. 351.

Hale

Hale ſays [h], that it is due of common right, and that no preſcription will diſcharge it.

III. THE king alſo (as was formerly obſerved [i]) is entitled to all the tithes ariſing in extraparochial places [k]: though
[284] perhaps it may be doubted how far this article, as well as the laſt, can be properly reckoned a part of the king's own royal revenue: ſince a corody ſupports only his chaplains, and theſe extraparochial tithes are held under an implied truſt, that the king will diſtribute them for the good of the clergy in general.

IV. THE next branch conſiſts in the firſt-fruits, and tenths, of all ſpiritual preferments in the kingdom; both of which I ſhall conſider together.

THESE were originally a part of the papal uſurpations over the clergy of this kingdom; firſt introduced by Pandulph the pope's legate, during the reigns of king John and Henry the third, in the ſee of Norwich; and afterwards attempted to be made univerſal by the popes Clement V and John XXII, about the beginning of the fourteenth century. The firſt-fruits, *primitiae*, or *annates*, were the firſt year's whole profits of the ſpiritual preferment, according to a rate or *valor* made under the direction of pope Innocent IV by Walter biſhop of Norwich in 38 Hen. III, and afterwards advanced in value by commiſſion from pope Nicholas III, *A. D.* 1292, 20 Edw. I [l]: which valuation of pope Nicholas is ſtill preſerved in the exchequer [m]. The tenths, or *decimae*, were the tenth part of the annual profit of each living by the ſame valuation; which was alſo claimed by the holy ſee, under no better pretence than a ſtrange miſapplication of that precept of the Levitical law, which directs [n], that the Levites "ſhould offer the tenth part of their tithes as a heave-offer-"ing to the Lord, and give it to Aaron the *high* prieſt." But this claim of the pope met with a vigorous reſiſtance from the

[h] Notes on F. N. B. above cited.
[i] page 113.
[k] 2 Inſt. 647.
[l] F. N. B. 176.
[m] 3 Inſt. 154.
[n] Numb. xviii. 26.

Engliſh

Engliſh parliament; and a variety of acts were paſſed to prevent and reſtrain it, particularly the ſtatute 6 Hen. IV. c. 1. which calls it a horrible miſchief and damnable cuſtom. But the popiſh clergy, blindly devoted to the will of a foreign maſter, ſtill kept it on foot; ſometimes more ſecretly, ſometimes more openly and avowedly: ſo that in the reign of Henry VIII, it was computed, that in the compaſs of fifty years 800,000 ducats had been ſent to Rome for firſt-fruits only. And, as the clergy expreſſed this unwillingneſs to contribute ſo much of their income to the head of the church, it was thought proper (when in the ſame reign the papal power was aboliſhed, and the king was declared the head of the church of England) to annex this revenue to the crown; which was done by ſtatute 26 Hen. VIII. c. 3. (confirmed by ſtatute 1 Eliz. c. 4.) and a new *valor beneficiorum* was then made, by which the clergy are at preſent rated (2).

By theſe laſt mentioned ſtatutes all vicarages under ten pounds a year, and all rectories under ten marks, are diſcharged from the payment of firſt-fruits: and if, in ſuch livings as continue chargeable with this payment, the incumbent lives but half a year, he ſhall pay only one quarter of his firſt-fruits; if but one whole year, then

(2) When the firſt-fruits and tenths were transferred to the crown of England, by 26 Hen. VIII. c. 3. at the ſame time it was enacted, that commiſſioners ſhould be appointed in every dioceſe, who ſhould certify the value of every eccleſiaſtical benefice and preferment in the reſpective dioceſes; and according to this valuation, the firſt-fruits and tenths were to be collected and paid in future. This *valor beneficiorum* is what is commonly called the King's Books; a tranſcript of which is given in Ecton's Theſaurus, and Bacon's Liber Regis.

half of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwiſe (3). Likewiſe by the ſtatute 27 Hen VIII. c. 8. no tenths are to be paid for the firſt year, for then the firſt-fruits are due: and by other ſtatutes of queen Anne, in the fifth and ſixth years of her reign, if a benefice be under fifty pounds *per annum* clear yearly value, it ſhall be diſcharged of the payment of firſt-fruits and tenths (4).

THUS the richer clergy, being, by the criminal bigotry of their popiſh predeceſſors, ſubjected at firſt to a foreign exaction, were afterwards, when that yoke was ſhaken off, liable to a like miſapplication of their revenues, through the rapacious diſpoſition of the then reigning monarch: till at length the piety of queen Anne reſtored to
[286] the church what had been thus indirectly taken from it. This ſhe did, not by remitting the tenths and firſt fruits entirely; but, in a ſpirit of the trueſt equity, by applying theſe ſuperfluities of the larger benefices to make up the deficiencies of the ſmaller. And to this end ſhe granted her royal charter, which was confirmed by the ſtatute 2 Ann. c. 11. whereby all the revenue of firſt-fruits and tenths is

(3) The archbiſhops and biſhops have four years allowed for the payment, and ſhall pay one quarter every year, if they live ſo long upon the biſhoprick; but other dignitaries in the church pay theirs in the ſame manner as rectors and vicars.

(4) After queen Anne had appropriated the revenue ariſing from the payment of firſt-fruits and tenths to the augmentation of ſmall livings, it was conſidered a proper extenſion of this principle to exempt the ſmaller livings from the incumbrance of thoſe demands; and, for that end, the biſhops of every dioceſe were directed to inquire and certify into the exchequer what livings did not exceed 50 *l.* a year according to the improved value at that time; and it was further provided, that ſuch livings ſhould be *diſcharged* from thoſe dues in future.

veſted

veſted in truſtees for ever, to form a perpetual fund for the augmentation of poor livings. This is uſually called queen Anne's bounty; which has been ſtill farther regulated by ſubſequent ſtatutes [o] (5).

[o] 5 Ann. c. 24. 6 Ann. c. 27. 1 G o. I. ſt. 2. c. 10. 3 Geo. I. c. 10.

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(5) Theſe truſtees were erected into a corporation, and have authority to make rules and orders for the diſtribution of this fund. The principal rules they have eſtabliſhed are, that the ſum to be allowed for each augmentation, ſhall be 200 *l.* to be laid out in land, which ſhall be annexed for ever to the living; and they ſhall make this donation, firſt, to all livings not exceeding 10 *l.* a year; then to all livings not above 20 *l.*; and ſo in order, whilſt any remain under 50 *l.* a year. But when any private benefactor will advance 200 *l.* the truſtees will give another 200 *l.* for the advancement of any living not above 45 *l.* a year, though it ſhould not belong to that claſs of livings which they are then augmenting. 2 *Burn. Ec. L.* 260.

Though this was a ſplendid inſtance of royal munificence, yet it's operation is ſlow and inconſiderable; for the number of livings certified to be under 50 *l.* a year, was no leſs than 5597, of which 2538 did not exeeed 20 *l.* a year each, and 1933 between 30 *l.* and 50 *l.* a year, and the reſt between 20 *l.* and 30 *l.*; ſo that there were 5597 benefices in this country which had leſs than 23 *l.* a year each upon an average. Dr. Burn calculates that from the fund alone, it will require 339 years from the year 1714, when it commenced, before all theſe livings can be raiſed to 50 *l.* And if private benefactors ſhould contribute half as much as the fund, (which is very improbable,) it will require 226 years. But even taking this ſuppoſition to have been true ever ſince the eſtabliſhment, it will follow, that the ſmall incomes from each of 5597 livings, both from the royal bounty and private benefaction, cannot, upon an average, have yet been augmented 9 *l.* a year. 2 *Burn. E. L.* 268. Dr. Burn, in this calculation, computes the clear amount of the bounty to make 55 augmentations yearly, that is, at 11,000 *l.* a year. But Dr. Burn, in this calculation, has not taken into conſideration the great increaſe in the rentals of all eſtates ſince the valuation of theſe ſmall livings was made in the time of queen Anne.

V. The next branch of the king's ordinary revenue (which, as well as the ſubſequent branches, is of a lay or temporal nature) conſiſts in the rents and profits of the demeſne lands of the crown. Theſe demeſne lands, *terrae dominicales regis*, being either the ſhare reſerved to the crown at the original diſtribution of landed property, or ſuch as came to it afterwards by forfeitures or other means, were antiently very large and extenſive; comprifing divers manors, honors, and lordſhips; the tenants of which had very peculiar privileges, as will be ſhewn in the ſecond book of theſe commentaries, when we ſpeak of the tenure in antient demeſne. At preſent they are contracted within a very narrow compaſs, having been almoſt entirely granted away to private ſubjects. This has occaſioned the parliament frequently to interpoſe; and, particularly, after king William III had greatly impoveriſhed the crown, an act paſſed [p], whereby all future grants or leaſes from the crown for any longer term than thirty-one years or three lives are declared to be void; except with regard to houſes, which may be granted for fifty years. And no reverſionary leaſe can be made, ſo as to exceed, together with the eſtate in being, the ſame term of three lives or thirty-one years: that is, where there is a ſubſiſting leaſe, of which there are twenty years ſtill to come, the king cannot grant a future intereſt, to commence after the expiration of the former, for any longer term than eleven years. The tenant
[287] muſt alſo be made liable to be puniſhed for committing waſte; and the uſual rent muſt be reſerved, or, where there has uſually been no rent, one third of the clear yearly value [q]. The misfortune is, that this act was made too late, after almoſt every valuable poſſeſſion of the crown had been granted away for ever, or elſe upon very long leaſes;

[p] 1 Ann. ſt. 1. c. 7.

[q] In like manner by the civil law, the inheritance or *fundi patrimoniales* of the imperial crown could not be alienated, but only let to farm. *Cod. l.* 11. *s.* 61.

but

but may be of ſome benefit to poſterity, when thoſe leaſes come to expire (6).

VI. HITHER might have been referred the advantages which uſed to ariſe to the king from the profits of his military tenures, to which moſt lands in the kingdom were ſubject, till the ſtatute 12 Car. II. c. 24. which in great meaſure aboliſhed them all: the explication of the nature of which tenures muſt be poſtponed to the ſecond book of theſe commentaries. Hither alſo might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up proviſions and other neceſſaries, by the intervention of the king's purveyors, for the uſe of his royal houſehold, at an appraiſed valuation, in preference to all others, and even without conſent of the owner: and alſo of forcibly impreſſing the carriages and horſes of the ſubject, to do the king's buſineſs on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a ſettled price. A prerogative, which prevailed pretty generally throughout Europe, during the ſcarcity of gold and ſilver, and the high valuation of money conſequential thereupon. In thoſe early times the king's houſehold (as well as thoſe of inferior lords) were ſupported by ſpecific renders of corn, and other victuals, from the tenants of the reſpective demeſnes; and there was alſo a continual market kept at the palace gate to furniſh viands for the royal uſe[r]. And this anſwered all purpoſes, in thoſe ages of ſimplicity, ſo

[r] 4 Inſt. 273.

(6) By the 26 Geo. III. c. 87. amended by 30 Geo. III. c. 50. commiſſioners were appointed to inquire into the ſtate and condition of the woods, foreſts, and land revenues belonging to the crown, and to ſell fee-farm and other unimproveable rents.

long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done) it was found neceſſary to
[288] ſend purveyors beforehand to get together a ſufficient quantity of proviſions and other neceſſaries for the houſehold: and, leſt the unuſual demand ſhould raiſe them to an exorbitant price, the powers before mentioned were veſted in theſe purveyors: who, in proceſs of time, very greatly abuſed their authority, and became a great oppreſſion to the ſubject, though of little advantage to the crown; ready money in open market (when the royal reſidence was more permanent, and ſpecie began to be plenty) being found upon experience to be the beſt proveditor of any. Wherefore by degrees the powers of purveyance have declined, in foreign countries as well as our own: and particularly were aboliſhed in Sweden by Guſtavus Adolphus, towards the beginning of the laſt century [a]. And, with us in England, having fallen into diſuſe during the ſuſpenſion of monarchy, king Charles at his reſtoration conſented, by the ſame ſtatute, to reſign entirely theſe branches of his revenue and power: and the parliament, in part of recompence, ſettled on him, his heirs and ſucceſſors, for ever, the hereditary exciſe of fifteen pence *per* barrel on all beer and ale ſold in the kingdom, and a proportionable ſum for certain other liquors. So that this hereditary exciſe, the nature of which ſhall be farther explained in the ſubſequent part of this chapter, now forms the ſixth branch of his majeſty's ordinary revenue.

VII. A SEVENTH branch might alſo be computed to have ariſen from wine licenſes; or the rents payable to the crown by ſuch perſons as are licenſed to ſell wine by retail throughout England, except in a few privileged places. Theſe were firſt ſettled on the crown by the ſtatute

[a] Mod. Un. Hiſt. xxiii. 220.

12 Car.

12 Car. II. c. 25. and, together with the hereditary exciſe, made up the equivalent in value for the loſs ſuſtained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was aboliſhed by the ſtatute 30 Geo. II. c. 19. and an annual ſum of upwards of 7000*l. per annum*, iſſuing out of the new ſtamp duties impoſed on wine licenſes, was ſettled on the crown in it's ſtead.

VIII. AN eighth branch of the king's ordinary revenue is [289] uſually reckoned to conſiſt in the profits ariſing from his foreſts. Foreſts are waſte grounds belonging to the king, repleniſhed with all manner of beaſts of chaſe or venary; which are under the king's protection, for the ſake of his royal recreation and delight: and, to that end, and for preſervation of the king's game, there are particular laws, privileges, courts and offices belonging to the king's foreſts; all which will be, in their turns, explained in the ſubſequent books of theſe commentaries. What we are now to conſider are only the profits ariſing to the king from hence, which conſiſt principally in amercements or fines levied for offences againſt the foreſt-laws. But as few, if any, courts of this kind for levying amercements [s] have been held ſince 1632, 8 Car. I. (7) and as, from the accounts given of the proceedings in that court by our hiſtories and law-books [t], nobody would now wiſh to ſee them again revived, it is needleſs (at leaſt in this place) to purſue this inquiry any farther.

[s] Roger North, in his life of lord keeper North, (43, 44.) mentions an eyre, or *iter*, to have been held ſouth of Trent ſoon after the reſtoration; but I have met with no report of it's proceedings.

[t] 1 Jones. 267—298.

(7) This was one of the odious methods adopted by Car. I. to raiſe a revenue without the aid of parliament.

IX. THE profits ariſing from the king's ordinary courts of juſtice make a ninth branch of his revenue. And theſe conſiſt not only in fines impoſed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters; but alſo in certain fees due to the crown in a variety of legal matters, as, for ſetting the great ſeal to charters, original writs, and other forenſic proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwiſe to inſure their title. As none of theſe can be done without the immediate intervention of the king, by himſelf or his officers, the law allows him certain perquiſites and profits, as a recompence for the trouble he undertakes for the public. Theſe, in proceſs of time, have been almoſt all granted out to private perſons, or elſe appropriated to certain particular uſes: ſo that, though our law-proceedings are ſtill loaded
[290] with their payment, very little of them is now returned into the king's exchequer; for a part of whoſe royal maintenance they were originally intended. All future grants of them, however, by the ſtatute 1 Ann. ſt. 1. c. 7. are to endure for no longer time than the prince's life who grants them.

X. A TENTH branch of the king's ordinary revenue, ſaid to be grounded on the conſideration of his guarding and protecting the ſeas from pirates and robbers, is the right to *royal fiſh*, which are whale and ſturgeon: and theſe, when either thrown aſhore, or caught near the coaſt, are the property of the king, on account [t] of their ſuperior excellence. Indeed our anceſtors ſeem to have entertained a very high notion of the importance of this right; it being the prerogative of the kings of Denmark and the dukes of Normandy [u]; and from one of theſe it was probably derived to our princes. It is expreſsly claimed and allowed in the ſtatute *de praerogativa regis* [w]: and the moſt antient treatiſes of law now extant make

[t] Plowd. 315. *Gr. Couſtum. cap.* 17.
[u] Stiernh. *de jure Sueonum. l.* 2. *c.* 8. [w] 17 Edw. II. *c.* 12.

mention of it[x]; though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter[y].

XI. ANOTHER maritime revenue, and founded partly upon the same reason (8), is that of shipwrecks: which are also declared to be the king's property by the same prerogative statute 17 Edw. II. c. 11. and were so, long before, at the common law. It is worthy observation, how greatly the law of wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the antient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that, by the loss of the ship, all property was gone out of the original owner[z]. But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first or- [291] dained by king Henry I. that if any person escaped alive out of the ship it should be no wreck[a]; and afterwards king Henry II. by his charter[b], declared, that if on the coasts of

[x] Bracton. *l.* 3. *c.* 3. Britton. *c.* 17. Fleta. *l.* 1. *c.* 45 & 46. *Memorand. Scacch'. H.* 24 *Edw.* I. 37. prefixed to Maynard's year book of Edward II.

[y] Ch. 4. page 223.

[z] Dr. & St d. 2. c. 51.

[a] Spelm. *Cod. apud* Wilkins. 305.

[b] 26 May, *A. D.* 1174. 1 Rym. *Fœd.* 36.

(8) I should rather presume that this prerogative was founded upon general principles of policy and convenience; for if every person was permitted to carry home what he found upon the sea-coast, the true owner would stand a very poor chance of recovering back his property: therefore, for the benefit of the owner, the law places it in the custody of the sheriff or a public officer of the crown, where it will be preserved safely and honestly, and to whom the owner is directed to make inquiries for the property he has lost.—And at a time when a rightful claimant is despaired of, it is very properly applied to the augmentation of the public revenue.

either

either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by king Richard the first; who, in the second year of his reign[c], not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also, that, if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king[d]. And the law, as laid down by Bracton in the reign of Henry III, seems still to have improved in it's equity. For then, if not only a dog (for instance) escaped, by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck[e]. And this is certainly most agreeable to reason; the rational claim of the king being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first[f], the time of limitation of claims, given by the charter of Henry II, is extended to a year and a day, according to the usage of Normandy[g]: and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples[h]; for it is now held[i], that
[292] not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep

c Rog. Hoved. *in Ric.* I.

d In like manner Constantine the great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or *fiscus*, restrained it by an edict (*Cod.* 11. 5. 1.) and ordered them to remain to the owners, adding this humane expostulation, "*Quod enim "jus habet fiscus in aliena calamitate, ut de "re tam luctuosa compendium sectetur?*"

e Bract. *l.* 3. *c.* 3.

f 3 Edw. I. *c* 4.

g *Gr. Coustum. c.* 17.

h Flet. *l.* 1. *c.* 44. 2 Inst. 167. 5 Rep. 107.

i Hamilton v. Davies. *Trin.* 11 *Geo. III. B. R.*

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the goods a year and a day, (as in France for one year, agreeably to the maritime laws of Oleron, and in Holland for a year and a half,) that if any man can prove a property in them, either in his own right or by right of repreſentation[k], they ſhall be reſtored to him without delay; but, if no ſuch property be proved within that time, they then ſhall be the king's. If the goods are of a periſhable nature, the ſheriff may ſell them, and the money ſhall be liable in their ſtead[l]. This revenue of wrecks is frequently granted out to lords of manors, as a royal franchiſe; and if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day[m].

IT is to be obſerved, that, in order to conſtitute a legal *wreck*, the goods muſt come to land. If they continue at ſea, the law diſtinguiſhes them by the barbarous and uncouth appellations of *jetſam*, *flotſam*, and *ligan*. Jetſam is where goods are caſt into the ſea, and there ſink and remain under water: flotſam is where they continue ſwimming on the ſurface of the waves: ligan is where they are ſunk in the ſea, but tied to a cork or buoy, in order to be found again[n]. Theſe are alſo the king's if no owner appears to claim them; but if any owner appears, he is entitled to recover the poſſeſſion. For even if they be caſt overboard, without any mark or buoy, in order to lighten the ſhip, the owner is not by this act of neceſſity conſtrued to have renounced his property[o]: much leſs can things ligan be ſuppoſed to be abandoned, ſince the owner has done all in his power to aſſert and retain his property. Theſe three are therefore accounted ſo far a diſtinct thing from the former, that by the king's grant to a man of wrecks, things jetſam, [293] flotſam, and ligan will not paſs[p].

j § 23.
k 2 Inſt. 168.
l Plowd. 166.
m 2 Inſt. 168. Bro. *Abr. tit. Wreck.*
n 5 Rep. 106.
o *Quae enim res in tempeſtate, levandae navis cauſa, ejiciuntur, hae dominium permanent. Quia palam eſt, eas non eo animo ejici, quod quis habere nolit.* Inſt. 2. 1. § 48.
p 5 Rep. 108.

WRECKS,

WRECKS, in their legal acceptation, are at preſent not very frequent: for, if any goods come to land, it rarely happens, ſince the improvement of commerce, navigation, and correſpondence, that the owner is not able to aſſert his property within the year and day limited by law. And in order to preſerve this property entire for him, and if poſſible to prevent wrecks at all, our laws have made many very humane regulations; in a ſpirit quite oppoſite to thoſe ſavage laws, which formerly prevailed in all the northern regions of Europe, and a few years ago were ſtill ſaid to ſubſiſt on the coaſts of the Baltic ſea, permitting the inhabitants to ſeize on whatever they could get as lawful prize: or, as an author of their own expreſſes it, "*in naufragorum miſeria et calamitate tanquam vultures ad praedam currere*[q]." For by the ſtatute 27 Edw. III. c. 13. if any ſhip be loſt on the ſhore, and the goods come to land, (which cannot, ſays the ſtatute, be called wreck,) they ſhall be preſently delivered to the merchants, paying only a reaſonable reward to thoſe that ſaved and preſerved them, which is entitled *ſalvage*. Alſo by the common law, if any perſons (other than the ſheriff) take any goods ſo caſt on ſhore, which are not legal wreck, the owners might have a commiſſion to inquire and find them out, and compel them to make reſtitution [r]. And by ſtatute 12 An. ſt. 2. c. 18. confirmed by 4 Geo. I. c. 12. in order to aſſiſt the diſtreſſed, and prevent the ſcandalous illegal practices on ſome of our ſea coaſts, (too ſimilar to thoſe on the Baltic,) it is enacted, that all head-officers and others of towns near the ſea ſhall, upon application made to them, ſummon as many hands as are neceſſary, and ſend them to the relief of any ſhip in diſtreſs, on forfeiture of 100*l.* and, in caſe of aſſiſtance given, ſalvage ſhall be paid by the owners, to be aſſeſſed by three neighbouring juſtices. All perſons that ſecrete any goods ſhall forfeit their treble value: and if
[294] they wilfully do any act whereby the ſhip is loſt or deſtroyed, by making holes in her, ſtealing her pumps, or otherwiſe, they are guilty of felony, without benefit of clergy. Laſtly, by the ſtatute 26 Geo. II. c. 19. plundering any veſſel either

[q] Stiernh. *de jure Sueon.* l. 3. c. 5. [r] F. N. B. 112.

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in diſtreſs, or wrecked, and whether any living creature be on board, or not, (for, whether wreck or otherwiſe, it is clearly not the property of the populace,) ſuch plundering, I ſay, or preventing the eſcape of any perſon that endeavours to ſave his life, or wounding him with intent to deſtroy him, or putting out falſe lights in order to bring any veſſel into danger, are all declared to be capital felonies; in like manner as the deſtroying of trees, ſteeples, or other ſtated ſea-marks, is puniſhed by the ſtatute 8 Eliz. c. 13. with a forfeiture of 100*l.* or outlawry. Moreover, by the ſtatute of George II, pilfering any goods caſt aſhore is declared to be petty larceny; and many other ſalutary regulations are made, for the more effectually preſerving ſhips of any nation in diſtreſs[s].

XII. A TWELFTH branch of the royal revenue, the right to mines, has it's original from the king's prerogative of coinage, in order to ſupply him with materials: and therefore thoſe mines, which are properly royal, and to which the king is entitled when found, are only thoſe of ſilver and gold[t]. By the old common law, if gold or ſilver be found in mines of baſe metal, according to the opinion of ſome the whole was a royal mine, and belonged to the king; though others held that it only did ſo, if the quantity of gold or ſilver was of greater value than the quantity of baſe metal[u]. But now by the ſtatutes 1 W. & M. ſt. 1. c. 30. and 5 W. & M. c. 6. this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, ſhall be looked upon as royal mines, notwithſtanding gold or ſilver may be extracted from them in any quantities: but that the king, or [295] perſons claiming royal mines under his authority, may have

[s] By the civil law, to deſtroy perſons ſhipwrecked, or prevent their ſaving the ſhip, is capital. And to ſteal even a plank from a veſſel in diſtreſs, or wrecked, makes the party liable to anſwer for the whole ſhip and cargo. (*Ff.* 47. 9. 3.) The laws alſo of the Wiſigoths, and the moſt early Neapolitan conſtitutions, puniſhed with the utmoſt ſeverity all thoſe who neglected to aſſiſt any ſhip in diſtreſs, or plundered any goods caſt on ſhore. (Lindenbrog. *Cod. LL. antiq.* 146. 715.)

[t] 2 Inſt. 577.

[u] Plowd. 336.

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the ore, (other than tin-ore in the counties of Devon and Cornwall,) paying for the ſame a price ſtated in the act. This was an extremely reaſonable law: for now private owners are not diſcouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the juſt rights of his revenue, ſince he may have all the precious metal contained in the ore, paying no more for it than the value of the baſe metal which it is ſuppoſed to be; to which baſe metal the land owner is by reaſon and law entitled.

XIII. To the ſame original may in part be referred the revenue of treaſure-trove, (derived from the French word, *trover*, to find,) called in Latin *theſaurus inventus*, which is where any money or coin, gold, ſilver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown; in which caſe the treaſure belongs to the king: but if he that hid it be known, or afterwards found out, the owner and not the king is entitled to it[u]. Alſo if it be found in the ſea, or *upon* the earth, it doth not belong to the king, but the finder, if no owner appears[w]. So that it ſeems it is the *hiding*, and not the *abandoning* of it, that gives the king a property: Bracton[x] defining it, in the words of the civilians, to be "*vetus depoſitio pecuniae.*" This difference clearly ariſes from the different intentions, which the law implies in the owner. A man, that hides his treaſure in a ſecret place, evidently does not mean to relinquiſh his property; but reſerves a right of claiming it again, when he ſees occaſion: and, if he dies and the ſecret alſo dies with him, the law gives it the king, in part of his royal revenue. But a man that ſcatters his treaſure into the ſea, or upon the public ſurface of the earth, is conſtrued to have abſolutely abandoned his property, and returned it into the common ſtock, without any intention of reclaiming it: and therefore it belongs, as in a ſtate of nature, to the firſt occupant, or

[u] 3 Inſt. 132. Dalt. of Sheriffs. c. 16.
[w] Britt. c. 17. Finch. L. 177.
[x] *l.* 3. *c.* 3. § 4.

finder;

finder(9); unleſs the owner appear and aſſert his right, which then proves that the loſs was by accident, and not with an intent to renounce his property.

FORMERLY all treaſure-trove belonged to the finder[y]; as was alſo the rule of the civil law[z]. Afterwards it was judged expedient for the purpoſes of the ſtate, and particularly for the coinage, to allow part of what was ſo found to the king; which part was aſſigned to be all *hidden* treaſure; ſuch as is *caſually loſt* and unclaimed, and alſo ſuch as is *deſignedly abandoned*, ſtill remaining the right of the fortunate finder. And that the prince ſhall be entitled to this hidden treaſure is now grown to be, according to Grotius[a], "*jus commune, et* "*quaſi gentium*:" for it is not only obſerved, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of depoſited treaſure was much more frequent, and the treaſures themſelves more conſiderable, in the infancy of our conſtitution, than at preſent. When the Romans, and other inhabitants of the reſpective countries which compoſed their empire, were driven out by the northern nations, they concealed their money under-ground: with a view of reſorting to it again when the heat of the irruption ſhould be over, and the invaders driven back to their deſerts. But, as this never happened, the treaſures were never claimed; and on the death of the owners the ſecret alſo died along with them. The conquering generals, being aware of the value of theſe hidden mines, made it highly penal to ſecrete them from the public ſervice. In England therefore, as among the feudiſts[b], the puniſhment of ſuch as concealed from the king the finding of hidden treaſure was formerly no leſs than death; but now it is only fine and impriſonment[c].

y Bracton. *l.* 3. *c.* 3. 3 Inſt. 133.
z *Ff.* 41 1. 31.
a *de jur. b. & p. l.* 2. *c.* 8. § 7.
b Glanv. *l.* 1. *c.* 2. Crag. 1. 16. 40.
c 3 Inſt. 133.

(9) This certainly is true, though it cannot be reconciled with the learned judge's doctrine, that all *bona vacantia* belong to the king. See p. 299.

XIV. WAIFS, *bona waviata*, are goods ſtolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. Theſe are given to the king by the law, as a puniſhment upon the owner, for not himſelf purſuing the felon, and taking away his goods from him[d]. And therefore
[297] if the party robbed do his diligence immediately to follow and apprehend the thief, (which is called making freſh *ſuit*,) or do convict him afterwards, or procure evidence to convict him, he ſhall have his goods again[e]. Waived goods do alſo not belong to the king, till ſeiſed by ſomebody for his uſe; for if the party robbed can ſeiſe them firſt, though at the diſtance of twenty years, the king ſhall never have them[f]. If the goods are hid by the thief, or left any where by him, ſo that he had them not about him, when he fled, and therefore did not throw them away in his flight; theſe alſo are not *bona waviata*, but the owner may have them again when he pleaſes[g]. The goods of a foreign merchant, though ſtolen and thrown away in flight, ſhall never be waifs[h]: the reaſon whereof may be, not only for the encouragement of trade, but alſo becauſe there is no wilful default in the foreign merchant's not purſuing the thief; he being generally a ſtranger to our laws, our uſages, and our language.

XV. ESTRAYS are ſuch valuable animals as are found wandering in any manor or lordſhip, and no man knoweth the owner of them, in which caſe the law gives them to the king as the general owner and lord paramount of the ſoil, in recompence for the damage which they may have done therein (10):

[d] Cro. Eliz. 694.
[e] Finch. L. 212.
[f] *Ibid.*
[g] 5 Rep. 109.
[h] Fitz. *Abr. tit. Eſtray.* 1. 3 Bulſtr. 19.

(10) This reaſon is not very ſatisfactory; for the king being the *ultimus hæres* of all the land in the kingdom, they muſt do the ſame injury to his intereſt, whether they are grazing in one place or another out of the king's domains. But the law is probably founded upon general policy; for by giving the eſtray to the king, or his grantee, and not to the finder, the owner has the beſt chance of having

and they now moſt commonly belong to the lord of the manor, by ſpecial grant from the crown. But, in order to veſt an abſolute property in the king, or his grantees, they muſt be proclaimed in the church and two market towns next adjoining to the place where they are found: and then, if no man claims them, after proclamation and a year and a day paſſed, they belong to the king or his ſubſtitute without redemption[i]; even though the owner were a minor, or under any other legal incapacity[k]. A proviſion ſimilar to which obtained in the old Gothic conſtitution, with regard to all things that were found, which were to be thrice proclaimed; *primum coram comitibus et viatoribus obviis, deinde in proxima* [298] *villa vel pago, poſtremo coram eccleſia vel judicio:* and the ſpace of a year was allowed for the owner to reclaim his property[l]. If the owner claims them within the year and day, he muſt pay the charges of finding, keeping, and proclaiming them[m] (11). The king or lord has no property till the year and day paſſed: for if a lord keepeth an eſtray three quarters of a year, and within the year it ſtrayeth again, and another lord getteth it, the firſt lord cannot take it again[n]. Any beaſts may be eſtrays, that are by nature tame or reclaimable, and in which there is a valuable property, as ſheep, oxen, ſwine, and horſes, which we in general call cattle; and ſo Fleta[o] defines them, *pecus vagans, quod nullus petit, ſequitur vel advocat.* For animals upon which the law ſets no value, as a dog or cat, and

i Mirr. c. 3. § 19.
k 5 Rep. 108. Bro. *Abr. tit. Eſtray.* Cro. Eliz. 716.
l Stiernh. *de jur. Gothor. l.* 3. *c.* 5.
m Dalt. Sh. 79.
n Finch. L. 177.
o *l.* 1. *c.* 43.

having his property reſtored to him; and it leſſens the temptation to commit theſts, as it prevents a man from pretending that he had found, as an eſtray, what he had actually ſtolen; or according to the vulgar phraſe, that he had found what was never loſt.

(11) But if any other perſon finds and takes care of another's property, not being entitled to it as an eſtray, the owner may recover it or it's value, without being obliged to pay the expences of keeping. 2 *Bl. Rep.* 1117.

animals *ferae naturae*, as a bear or wolf, cannot be conſidered as eſtrays. So ſwans may be eſtrays, but not any other fowl[p]; whence they are ſaid to be royal fowl. The reaſon of which diſtinction ſeems to be, that, cattle and ſwans being of a reclaimed nature, the owner's property in them is not loſt merely by their temporary eſcape; and they alſo, from their intrinſic value, are a ſufficient pledge for the expence of the lord of the franchiſe in keeping them the year and day. For he that takes an eſtray is bound, ſo long as he keeps it, to find it in proviſions and preſerve it from damage[q]; and may not uſe it by way of labour, but is liable to an action for ſo doing[r]. Yet he may milk a cow, or the like; for that tends to the preſervation, and is for the benefit of the animal[s].

BESIDES the particular reaſons before given why the king ſhould have the ſeveral revenues of royal fiſh, ſhipwrecks, treaſure-trove, waifs, and eſtrays, there is alſo one general reaſon which holds for them all; and that is, becauſe they are *bona vacantia*, or goods in which no one elſe can claim a property. And therefore by the law of nature they belonged to the firſt occupant or finder; and ſo continued under the
[299] imperial law. But, in ſettling the modern conſtitutions of moſt of the governments in Europe, it was thought proper (to prevent that ſtrife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the ſupport of public authority in a manner the leaſt burthenſome to individuals) that theſe rights ſhould be annexed to the ſupreme power by the poſitive laws of the ſtate. And ſo it came to paſs that, as Bracton expreſſes it[t], *haec quae nullius in bonis ſunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium* (12).

[p] 7 Rep. 17.
[q] 1 Roll. Abr. 889.
[r] Cro. Jac. 147.
[s] Cro. Jac. 148. Noy. 119.
[t] *l.* 1, *c.* 12.

(12) This cannot be reconciled with what the learned Judge has advanced in p. 295, viz. that if "any thing be found in the ſea, "or upon the earth, it doth not belong to the king but the finder, "if no owner appears." That certainly is the law of England; and

XVI. THE next branch of the king's ordinary revenue conſiſts in forfeitures of lands and goods for offences; *bona confiſcata*, as they are called by the civilians, becauſe they belonged to the *fiſcus* or imperial treaſury; or, as our lawyers term them, *forisfacta*; that is, ſuch whereof the property is gone away or departed from the owner. The true reaſon and only ſubſtantial ground of any forfeiture for crimes conſiſt in this; that all property is derived from ſociety, being one of thoſe civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man muſt ſacrifice when he enters into ſocial communities. If therefore a member of any national community violates the fundamental contract of his aſſociation, by tranſgreſſing the municipal law, he forfeits his right to ſuch privileges as he claims by that contract; and the ſtate may very juſtly reſume that portion of property, or any part of it, which the laws have before aſſigned him. Hence, in every offence of an atrocious kind, the laws of England have exacted a

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and which, with deference to the learned Judge, is the general rule with regard to all *bona vacantia*, except in the particular inſtances in which the law has given them to the king. Thoſe inſtances are exceptions, which prove the rule, for *expreſſio unius eſt excluſio alterius*. See the caſe of Armory *v.* Delamirie in Strange, 505. where a chimney-ſweeper's boy recovered from a goldſmith, who detained from him a diamond which he had found, the value of the fineſt diamond which would fit the ſocket from which it was taken. And it was clearly held, that the boy had a right to it againſt all the world, except the owner, who did not appear. And I cannot but think that the learned Judge has miſconceived the ſentence in Bracton, which is this, *Item de hiis, quæ pro wayvio habentur, ſicut de averiis, ubi non apparet dominus, et quæ olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.* Here the *quæ olim* refer only to the two antecedents *wayvia* and *averia*, or perhaps to *averia* only; by which conſtruction the ſentence is conſiſtent, and the whole correct. But if it had been intended that it ſhould be underſtood as if *omnia* had preceded *quæ*, it would have been ſuperfluous to have inſtanced *averia*, and the ſentence would certainly have been erroneous.

total confiſcation of the moveables or perſonal eſtate; and in many caſes a perpetual, in others only a temporary, loſs of the offender's immoveables or landed property; and have veſted them both in the king, who is the perſon ſuppoſed to be offended, being the one viſible magiſtrate in whom the majeſty of the public reſides. The particulars of theſe forfeitures will be more properly recited when we treat of crimes
[300] and miſdemeſnors. I therefore only mention them here, for the ſake of regularity, as a part of the *cenſus regalis*; and ſhall poſtpone for the preſent the farther conſideration of all forfeitures, excepting one ſpecies only, which ariſes from the misfortune rather than the crime of the owner, and is called a *deodand*.

By this is meant whatever perſonal chattel is the immediate occaſion of the death of any reaſonable creature: which is forfeited to the king, to be applied to pious uſes, and diſtributed in alms by his high almoner[u]; though formerly deſtined to a more ſuperſtitious purpoſe. It ſeems to have been originally deſigned, in the blind days of popery, as an expiation for the ſouls of ſuch as were ſnatched away by ſudden death; and for that purpoſe ought properly to have been given to holy church[w]: in the ſame manner as the apparel of a ſtranger, who was found dead, was applied to purchaſe maſſes for the good of his ſoul. And this may account for that rule of law, that no deodand is due where an infant under the age of diſcretion is killed by a fall *from* a cart, or horſe, or the like, not being in motion[x]; whereas, if an adult perſon falls from thence and is killed, the thing is certainly forfeited. For the reaſon given by ſir Matthew Hale ſeems to be very inadequate, *viz.* becauſe an infant is not able to take care of himſelf; for why ſhould the owner ſave his forfeiture, on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of miſchief? The true ground of this rule ſeems rather to have been, that the child,

[u] 1 Hal. P. C. 419. Fleta. *l.* 1. *c.* 25. Stauſ. P. C. 20, 21.
[w] Fitzh. *Abr. tit. Enditement, pl.* 27. [x] 3 Inſt. 57 1 Hal. P. C. 422.

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by reaſon of it's want of diſcretion, was preſumed incapable of actual ſin, and therefore needed no deodand to purchaſe propitiatory maſſes: but every adult, who died in actual ſin, ſtood in need of ſuch atonement, according to the humane ſuperſtition of the founders of the Engliſh law.

THUS ſtands the law if a perſon be killed by a fall from a thing ſtanding ſtill. But if a horſe, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if [301] a cart run over him, they ſhall in either caſe be forfeited as deodands [y]; which is grounded upon this additional reaſon, that ſuch misfortunes are in part owing to the negligence of the owner, and therefore he is properly puniſhed by ſuch forfeiture. A like puniſhment is in like caſes inflicted by the Moſaical law [z]; "if an ox gore a man that he die, the ox "ſhall be ſtoned, and his fleſh ſhall not be eaten." And, among the Athenians [a], whatever was the cauſe of a man's death, by falling upon him, was exterminated or caſt out of the dominions of the republic (13). Where a thing, not in motion, is the occaſion of a man's death, that part only which is the immediate cauſe is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand [b]: but, wherever the thing is in motion, not only that part which immediately gives the

[y] *Omnia, quae movent ad mortem, ſunt Deo danda.* Bracton. *l.* 3. *c.* 5.

[z] Exod. xxi. 28.

[a] Aeſchin. *cont. Ctefiph.* Thus too by our antient law, a well in which a perſon was drowned, was ordered to be filled up, under the inſpection of the coroner. Flet. *l.* 1. *c.* 25. § 10. Fitzh. Abr. *t. corone.* 416.

[b] 1 Hal. P. C. 422.

(13) This was one of Draco's laws; and perhaps we may think the judgment, that a ſtatue ſhould be thrown into the ſea for having fallen upon a man, leſs abſurd, when we reflect that there may be found policy in teaching the mind to contemplate with horror the privation of human life, and that our familiarity even with an inſenſible object which has been the occaſion of death, may leſſen that ſentiment. Though there may be wiſdom in withdrawing ſuch a thing from public view, yet there can be none in treating it as if it was capable of underſtanding the ends of puniſhment.

wound, (as the wheel, which runs over his body,) but all things which move with it, and help to make the wound more dangerous, (as the cart and loading, which increaſe the preſſure of the wheel,) are forfeited [c]: It matters not whether the owner were concerned in the killing or not; for, if a man kills another with my ſword, the ſword is forfeited [d] as an accurſed thing [e]. And therefore, in all indictments for homicide, the inſtrument of death and the value are preſented and found by the grand jury, (as, that the ſtroke was given by a certain penknife, value ſixpence,) that the king or his grantee may claim the deodand: for it is no deodand, unleſs it be preſented as ſuch by a jury of twelve men [f]. No deodands are due for accidents happening upon the high ſea, that being out of the juriſdiction of the common law: but if
[302] a man falls from a boat or ſhip in freſh water, and is drowned, it hath been ſaid, that the veſſel and cargo are in ſtrictneſs of law a deodand [g]. But juries have of late very frequently taken upon themſelves to mitigate theſe forfeitures, by finding only ſome trifling thing, or part of an entire thing, to have been the occaſion of the death. And in ſuch caſes, although the finding by the jury be hardly warrantable by law, the court of king's bench hath generally refuſed to interfere on behalf of the lord of the franchiſe, to aſſiſt ſo unequitable a claim [h] (14).

[c] 1 Hawk. P. C. c. 26.

[d] A ſimilar rule obtained among the antient Goths. *Si quis, me neſciente, quocunque meo telo vel inſtrumento in perniciem ſuam abutatur; vel ex aedibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractum, et ſub molendino meo confringatur; ipſe aliqua multa plectar; ut in parte infelicitatis meae numeretur, habuiſſe vel adſiciſſe aliquod quo homo periret.* Stiernhook *de jure Goth.* l. 3. c. 4.

[e] Dr. & St. d. 2. c. 51.

[f] 3 Inſt. 57.

[g] 3 Inſt. 58. 1 Hal. P. C. 423. Molloy *de jur. maritim.* 2. 225.

[h] Foſter of homicide. 266.

(14) But would it not be much better that laws ſhould be aboliſhed, the policy of which has long ceaſed, and at which the underſtandings of mankind ſo ſtrongly revolt, that juries are inclined to trifle with their oaths, and judges to encourage ridiculous diſtinctions, which tend to bring the general adminiſtration of juſtice into contempt?

DEODANDS, and forfeitures in general, as well as wrecks, treaſure-trove, royal fiſh, mines, waifs, and eſtrays, may be granted by the king to particular ſubjects, as a royal franchiſe: and indeed they are for the moſt part granted out to the lords of manors, or other liberties: to the perverſion of their original deſign.

XVII. ANOTHER branch of the king's ordinary revenue ariſes from eſcheats of lands, which happen upon the defect of heirs to ſucceed to the inheritance; whereupon they in general revert to and veſt in the king, who is eſteemed, in the eye of the law, the original proprietor of all the lands in the kingdom. But the diſcuſſion of this topic more properly belongs to the ſecond book of theſe commentaries, wherein we ſhall particularly conſider the manner in which lands may be acquired or loſt by eſcheat.

XVIII. I PROCEED therefore to the eighteenth and laſt branch of the king's ordinary revenue; which conſiſts in the cuſtody of idiots, from whence we ſhall be naturally led to conſider alſo the cuſtody of lunatics.

AN idiot, or natural fool, is one that hath had no underſtanding from his nativity; and therefore is by law preſumed never likely to attain any. For which reaſon the cuſtody of him and of his lands was formerly veſted in the lord of the [303] fee [h]; (and therefore ſtill, by ſpecial cuſtom, in ſome manors the lord ſhall have the ordering of idiot and lunatic copyholders [i]) but, by reaſon of the manifold abuſes of this power by ſubjects, it was at laſt provided by common conſent, that it ſhould be given to the king, as the general conſervator of his people; in order to prevent the idiot from waſting his eſtate, and reducing himſelf and his heirs to poverty and diſtreſs [k]. This fiſcal prerogative of the king is declared in parliament by ſtatute 17 Edw. II. c. 9. which directs (in affirmance of the common law [l]) that the king ſhall have ward

[h] Flet. l. 1. c. 11. § 10.
[i] Dyer. 302. Hutt. 17. Noy. 27.
[k] F. N. B. 232.
[l] 4 Rep. 126. *Memorand' Scacc' 20 Edw. I.* (prefixed to Maynard's year-book of Edw. II.) fol. 20. 24.

of the lands of natural fools, taking the profits without waſte or deſtruction, and ſhall find them neceſſaries; and after the death of ſuch idiots he ſhall render the eſtate to the heirs: in order to prevent ſuch idiots from aliening their lands, and their heirs from being diſinherited (15).

By the old common law there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not[m]: which muſt be tried by a jury of twelve men: and, if they find him *purus idiota*, the profits of his lands and the cuſtody of his perſon may be granted by the king to ſome ſubject, who has intereſt enough to obtain them[n]. This branch of the revenue hath been long conſidered as a hardſhip upon private families: and ſo long ago as in the 8 Jac. I. it was under the conſideration of parliament, to veſt this cuſtody in the relations of the party, and to ſettle an equivalent on the crown in lieu of it; it being then propoſed to ſhare the ſame fate with the ſlavery of the feodal tenures, which has been ſince aboliſhed[o]. Yet few inſtances can be given of the oppreſſive exertion of it, ſince it ſeldom happens that a jury finds a man an idiot *a nativitate*, but only *non compos mentis* from ſome particular time; which has an operation very different in point of law.

[m] F. N. B. 232.

[n] This power, though of late very rarely exerted, is ſtill alluded to in common ſpeech, by that uſual expreſſion of *begging* a man for a fool.

[o] 4 Inſt. 203. Com. journ. 1610.

(15) The juriſdiction which the chancellor has generally, or perhaps always, exerciſed over the perſons and eſtates of lunatics and idiots, is not neceſſarily annexed to the cuſtody of the great ſeal; for it has been declared by the houſe of lords, "that the "cuſtody of idiots and lunatics was in the power of the king, who "might delegate the ſame to ſuch perſon as he ſhould think fit." And upon every change of the great ſeal, a ſpecial authority under his majeſty's royal ſign manual is granted to the new chancellor for that purpoſe. Hence no appeal lies from the chancellor's orders upon this ſubject to the houſe of lords, but to the king in council. *Dom. Proc.* 14 Feb. 1726, 3 *P. Wms.* 108.

A MAN

A MAN is not an idiot[p], if he hath any glimmering of reaſon, ſo that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the ſame ſtate with an idiot[q]; he being ſuppoſed incapable of any underſtanding, as wanting all thoſe ſenſes which furniſh the human mind with ideas.

A LUNATIC, or *non compos mentis*, is one who hath had underſtanding, but by diſeaſe, grief, or other accident hath loſt the uſe of his reaſon[r]. A lunatic is indeed properly one that hath lucid intervals; ſometimes enjoying his ſenſes, and ſometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which ſir Edward Coke ſays is the moſt legal name[s]) are comprized not only lunatics, but perſons under frenzies; or who loſe their intellects by diſeaſe; thoſe that *grow* deaf, dumb, and blind, not being *born* ſo; or ſuch, in ſhort, as are judged by the court of chancery incapable of conducting their own affairs. To theſe alſo, as well as idiots, the king is guardian, but to a very different purpoſe. For the law always imagines, that theſe accidental misfortunes may be removed; and therefore only conſtitutes the crown a truſtee for the unfortunate perſons, to protect their property, and to account to them for all profits received, if they recover, or after their deceaſe to their repreſentatives. And therefore it is declared by the ſtatute 17 Edw. II. c. 10. that the king ſhall provide for the cuſtody and ſuſtentation of lunatics, and preſerve their lands and the profits of them for their uſe, when they come to their right mind; and the king ſhall take nothing to his own uſe: and if the parties die in ſuch eſtate, the reſidue ſhall be diſtributed for their ſouls by the advice of the ordinary, and of courſe (by the ſubſequent amendments of the law of adminiſtration) ſhall now go to their executors or adminiſtrators.

[p] F. N. B. 233.
[q] Co. Litt. 42. Fleta. *l.* 6. *c.* 40.
[r] *Idiota a caſu et infirmitate.* (*Mem. Scacch.* 20 *Edw. I.* in Maynard's year-book of Edw. II. 20.)
[s] 1 Inſt. 246.

ON

ON the firſt attack of lunacy, or other occaſional inſanity, while there may be hopes of a ſpeedy reſtitution of reaſon, it is uſual to confine the unhappy objects in private cuſtody under the direction of their neareſt friends and relations: and the legiſlature, to prevent all abuſes incident to ſuch private cuſtody, hath thought proper to interpoſe it's authority, by ſtatute 14 Geo. III. c. 49. (continued by 19 Geo. III. c. 15.) (16) for regulating private mad-houſes. But, when the diſorder is grown permanent, and the circumſtances of the party will bear ſuch additional expence, it is proper to apply to the royal authority to warrant a laſting confinement.

[305] THE method of proving a perſon *non compos* is very ſimilar to that of proving him an idiot. The lord chancellor, to whom, by ſpecial authority from the king, the cuſtody of idiots and lunatics is entruſted[t], upon petition or information, grants a commiſſion in nature of the writ *de idiota inquirendo*, to inquire into the party's ſtate of mind; and if he be found *non compos*, he uſually commits the care of his perſon, with a ſuitable allowance for his maintenance, to ſome friend, who is then called his committee. However, to prevent ſiniſter practices, the next heir is ſeldom permitted to be this committee of the perſon; becauſe it is his intereſt that the party ſhould die. But it hath been ſaid, there lies not the ſame objection againſt his next of kin, provided he be not his heir; for it is his intereſt to preſerve the lunatic's life, in order to increaſe the perſonal eſtate by ſavings, which he or his family may hereafter be entitled to enjoy[u]. The

[t] 3 P. Wms. 103. [u] 2 P. Wms. 638.

(16) And made perpetual by 26 Geo. III. c. 91. By that ſtatute no perſon ſhall confine more than one lunatic in a houſe kept for the reception of lunatics, without an annual licence from the college of phyſicians or the juſtices in ſeſſions, under a penalty of 500*l.* And if the keeper of a licenſed houſe receive any perſon as a lunatic, without a certificate from a phyſician, ſurgeon, or apothecary, that he is a fit perſon to be received as a lunatic, he ſhall forfeit 100*l.*

heir

heir is generally made the manager or committee of the eſtate, it being clearly his intereſt by good management to keep it in condition: accountable however to the court of chancery, and to the *non compos* himſelf, if he recovers; or otherwiſe, to his adminiſtrators.

IN this caſe of idiots and lunatics the civil law agrees with ours; by aſſigning them tutors to protect their perſons, and curators to manage their eſtates. But in another inſtance the Roman law goes much beyond the Engliſh. For, if a man by notorious prodigality was in danger of waſting his eſtate, he was looked upon as *non compos*, and committed to the care of curators or tutors by the praetor [u]. And by the laws of Solon ſuch prodigals were branded with perpetual infamy [w]. But with us, when a man on an inqueſt of idiocy hath been returned an *unthrift* and not an *idiot* [x], no farther proceedings have been had. And the propriety of the practice itſelf ſeems to be very queſtionable. It was doubtleſs an excellent method of benefiting the individual, and of preſerving eſtates in families; but it hardly ſeems calculated for the genius of a free nation, who claim and exerciſe the liberty of uſing their own property as they pleaſe. "*Sic utere tuo, ut alienum* "*non laedas*," is the only reſtriction our laws have given with regard to oeconomical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance ſomewhere, are perhaps not a little conducive towards keeping our mixed conſtitution in it's due health and vigour. [306]

THIS may ſuffice for a ſhort view of the king's *ordinary* revenue, or the proper patrimony of the crown; which was very large formerly, and capable of being increaſed to a magnitude truly formidable: for there are very few eſtates in the kingdom, that have not, at ſome period or other ſince the

[u] *Solent praetores, ſi talem hominem inveneriut, qui neque tempus neque finem expenſarum habet, ſed bona ſua dilacerando et diſſipando profundit, curatorem ei dare, exemplo furioſi: et tamdiu erunt ambo in curatione, quamdiu vel furioſus ſanitatem, vel ille bones mores, receperit. Ff. 27. 10. 1.*

[w] Potter Antiq. b. 1. c. 26.

[x] Bro. *Abr. tit. Idiot.* 4.

Norman conqueſt, been veſted in the hands of the king by forfeiture, eſcheat, or otherwiſe. But, fortunately for the liberty of the ſubject, this hereditary landed revenue, by a ſeries of improvident management, is ſunk almoſt to nothing; and the caſual profits, ariſing from the other branches of the *cenſus regalis*, are likewiſe almoſt all of them alienated from the crown. In order to ſupply the deficiencies of which, we are now obliged to have recourſe to new methods of raiſing money, unknown to our early anceſtors; which methods conſtitute the king's *extraordinary* revenue. For, the public patrimony being got into the hands of private ſubjects, it is but reaſonable that private contributions ſhould ſupply the public ſervice. Which, though it may perhaps fall harder upon ſome individuals, whoſe anceſtors have had no ſhare in the general plunder, than upon others, yet, taking the nation throughout, it amounts to nearly the ſame; provided the gain by the extraordinary, ſhould appear to be no greater than the loſs by the ordinary, revenue. And, perhaps, if every gen-
[307] tleman in the kingdom was to be ſtripped of ſuch of his lands as were formerly the property of the crown; was to be again ſubject to the inconveniencies of purveyance and pre-emption, the oppreſſion of foreſt laws, and the ſlavery of feodal tenures; and was to reſign into the king's hands all his royal franchiſes of waifs, wrecks, eſtrays, treaſure-trove, mines, deodands, forfeitures, and the like; he would find himſelf a greater loſer, than by paying his *quota* to ſuch taxes, as are neceſſary to the ſupport of government. The thing therefore to be wiſhed and aimed at in a land of liberty is by no means the total abolition of taxes, which would draw after it very pernicious conſequences, and the very ſuppoſition of which is the height of political abſurdity. For as the true idea of government and magiſtracy will be found to conſiſt in this, that ſome few men are deputed by many others to preſide over public affairs, ſo that individuals may the better be enabled to attend their private concerns; it is neceſſary that thoſe individuals ſhould be bound to contribute a portion of their private gains, in order to ſupport that government, and reward that magiſtracy, which protects them in the enjoyment of their reſpective properties.

properties. But the things to be aimed at are wiſdom and moderation, not only in granting, but alſo in the method of raiſing the neceſſary ſupplies; by contriving to do both in ſuch a manner as may be moſt conducive to the national welfare, and at the ſame time moſt conſiſtent with oeconomy and the liberty of the ſubject; who, when properly taxed, contributes only, as was before obſerved [y], ſome part of his property, in order to enjoy the reſt.

THESE extraordinary grants are uſually called by the ſynonymous names of aids, ſubſidies, and ſupplies; and are granted, we have formerly ſeen [z], by the commons of Great Britain in parliament aſſembled: who, when they have voted a ſupply to his majeſty, and ſettled the *quantum* of that ſupply, uſually reſolve themſelves into what is called a committee of ways and means, to conſider the ways and means of raiſing the ſupply ſo voted. And in this committee every member (though it is looked upon as the peculiar province [308] of the chancellor of the exchequer) may propoſe ſuch ſcheme of taxation as he thinks will be leaſt detrimental to the public. The reſolutions of this committee, when approved by a vote of the houſe, are in general eſteemed to be (as it were) final and concluſive. For, though the ſupply cannot be actually raiſed upon the ſubject till directed by an act of the whole parliament, yet no monied man will ſcruple to advance to the government any quantity of ready caſh, on the credit of a bare vote of the houſe of commons, though no law be yet paſſed to eſtabliſh it.

THE taxes, which are raiſed upon the ſubject, are either annual or perpetual. The uſual annual taxes are thoſe upon land and malt.

I. THE land tax, in it's modern ſhape, has ſuperſeded all the former methods of rating either property, or perſons in reſpect of their property, whether by tenths or fifteenths, ſubſidies on land, hydages, ſcutages, or talliages; a ſhort explication of which will however greatly aſſiſt us in underſtanding our antient laws and hiſtory.

[y] page 281. [z] page 169.

TENTHS,

TENTHS, and fifteenths[a], were temporary aids iſſuing out of perſonal property, and granted to the king by parliament. They were formerly the real tenth or fifteenth part of all the moveables belonging to the ſubject; when ſuch moveables, or perſonal eſtates, were a very different and a much leſs conſiderable thing than what they uſually are at this day. Tenths are ſaid to have been firſt granted under Henry the ſecond, who took advantage of the faſhionable zeal for croiſades to introduce this new taxation, in order to defray the expence of a pious expedition to Paleſtine, which he really or ſeemingly had projected againſt Saladine emperor of the Saracens; whence it was originally denominated the Saladine tenth[b]. But afterwards fifteenths were more uſually granted than tenths. Originally the amount of theſe taxes was uncertain, being levied by aſſeſſments new made at every freſh [309] grant of the commons, a commiſſion for which is preſerved by Matthew Paris[c]: but it was at length reduced to a certainty in the eighth year of Edward III, when, by virtue of the king's commiſſion, new taxations were made of every townſhip, borough, and city in the kingdom, and recorded in the exchequer; which rate was, at the time, the fifteenth part of the value of every townſhip, the whole amounting to about 29,000*l.* and therefore it ſtill kept up the name of a fifteenth, when, by the alteration of the value of money and the increaſe of perſonal property, things came to be in a very different ſituation. So that when, of later years, the commons granted the king a fifteenth, every pariſh in England immediately knew their proportion of it; that is, the ſame identical ſum that was aſſeſſed by the ſame aid in the eighth of Edward III; and then raiſed it by a rate among themſelves, and returned it into the royal exchequer.

THE other antient levies were in the nature of a modern land tax: for we may trace up the original of that charge as high as to the introduction of our military tenures[d]; when

[a] 2 Inſt. 77. 4 Inſt. 34.

[b] Hoved. *A. D.* 1188. Carte, 1. 719. Hume, 1. 329.

[c] *A. D.* 1232.

[d] See the ſecond book of theſe commentaries.

every

every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this perſonal attendance growing troubleſome in many reſpects, the tenants found means of compounding for it, by firſt ſending others in their ſtead, and in proceſs of time by making a pecuniary ſatisfaction to the crown in lieu of it. This pecuniary ſatisfaction at laſt came to be levied by aſſeſſments, at ſo much for every knight's fee, under the name of ſcutages; which appear to have been levied for the firſt time in the fifth year of Henry the ſecond, on account of his expedition to Toulouſe, and were then (I apprehend) mere arbitrary compoſitions, as the king and the ſubject could agree. But this precedent being afterwards abuſed into a means of [310] oppreſſion, (in levying ſcutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expences) it became thereupon a matter of national complaint; and king John was obliged to promiſe in his *magna carta*[e], that no ſcutage ſhould be impoſed without the conſent of the common council of the realm. This clauſe was indeed omitted in the charters of Henry III, where[f] we only find it ſtipulated, that ſcutages ſhould be taken as they were uſed to be in the time of king Henry the ſecond. Yet afterwards, by a variety of ſtatutes under Edward I, and his grandſon[g], it was provided, that the king ſhall not take any aids or taſks, any talliage or tax, but by the common aſſent of the great men and commons in parliament.

OF the ſame nature with ſcutages upon knights-fees were the aſſeſſments of hydage upon all other lands, and of talliage upon cities and burghs[h]. But they all gradually fell into diſuſe upon the introduction of ſubſidies, about the time of king Richard II and king Henry IV. Theſe were a tax, not immediately impoſed upon property, but upon perſons in reſpect of their reputed eſtates, after the nominal rate of 4 *s.* in

[e] *cap.* 14.
[f] 9 Hen. III. c. 37.
[g] 25 Edw. I. c. 5 & 6. 34 Edw. I. ſt. 4. c. 1. 14 Edw. III. ſt. 2. c. 1.
[h] Madox. hiſt. exch. 480.

the

the pound for lands, and 2*s.* 8*d.* for goods; and for thoſe of aliens in a double proportion. But this aſſeſſment was alſo made according to an ancient valuation; wherein the computation was ſo very moderate, and the rental of the kingdom was ſuppoſed to be ſo exceeding low, that one ſubſidy of this ſort did not, according to ſir Edward Coke [i], amount to more than 70,000*l.* whereas a modern land tax at the ſame rate produces two millions. It was antiently the rule never to grant more than one ſubſidy and two fifteenths at a time: but this rule was broken through for the firſt time on a very preſſing occaſion, the Spaniſh invaſion in 1588; when the parliament gave queen Elizabeth two ſubſidies and four-fifteenths. Afterwards, as money ſunk in value, more ſubſidies were given; and we have an inſtance in the firſt parliament of 1640, of the king's deſiring twelve ſubſidies of the com-
[311] mons, to be levied in three years; which was looked upon as a ſtartling propoſal: though lord Clarendon ſays [k], that the ſpeaker, ſerjeant Glanville, made it manifeſt to the houſe, how very inconſiderable a ſum twelve ſubſidies amounted to, by telling them he had computed what he was to pay for them himſelf; and when he named the ſum, he being known to be poſſeſſed of a great eſtate, it ſeemed not worth any farther deliberation. And indeed, upon calculation, we ſhall find, that the total amount of theſe twelve ſubſidies, to be raiſed in three years, is leſs than what is now raiſed in one year, by a land tax of two ſhillings in the pound.

THE grant of ſcutages, talliages, or ſubſidies by the commons did not extend to ſpiritual preferments; thoſe being uſually taxed at the ſame time by the clergy themſelves in convocation: which grants of the clergy were confirmed in parliament, otherwiſe they were illegal, and not binding: as the ſame noble writer obſerves of the ſubſidies granted by the convocation, which continued ſitting after the diſſolution of the firſt parliament in 1640. A ſubſidy granted by the clergy was after the rate of 4*s.* in the pound according to the valuation of their livings in the king's books; and

[i] 4 Inſt. 33. [k] Hiſt. b. 2. [i] 4 Inſt. 33.

amounted,

amounted, as ſir Edward Coke tells us [l], to about 20,000 *l.* While this cuſtom continued, convocations were wont to ſit as frequently as parliaments: but the laſt ſubſidies, thus given by the clergy, were thoſe confirmed by ſtatute 15 Car. II. cap. 10. ſince which another method of taxation has generally prevailed, which takes in the clergy as well as the laity: in recompence for which the beneficed clergy have from that period been allowed to vote at the election of knights of the ſhire [m]; and thenceforward alſo the practice of giving eccleſiaſtical ſubſidies hath fallen into total diſuſe.

THE lay ſubſidy was uſually raiſed by commiſſioners appointed by the crown, or the great officers of ſtate: and therefore in the beginning of the civil wars between Charles I and his parliament, the latter having no other ſufficient revenue [312] to ſupport themſelves and their meaſures, introduced the practice of laying weekly and monthly aſſeſſments [n] of a ſpecific ſum upon the ſeveral counties of the kingdom; to be levied by a pound rate on lands and perſonal eſtates: which were occaſionally continued during the whole uſurpation, ſometimes at the rate of 120000 *l.* a month, ſometimes at inferior rates [o]. After the reſtoration the antient method of granting ſubſidies, inſtead of ſuch monthly aſſeſſments, was twice, and twice only, renewed; *viz.* in 1663, when four ſubſidies were granted by the temporalty, and four by the clergy; and in 1670, when 800000 *l.* was raiſed by way of ſubſidy, which was the laſt time of raiſing ſupplies in that manner (18). For, the monthly aſſeſſments being now eſtabliſhed

[l] 4 Inſt. 33.

[m] Dalt. of ſheriffs, 418. Gilb. hiſt. of exch. c. 4.

[n] 29 Nov. 4 Mar. 1642.

[o] One of theſe bills of aſſeſſment, in 1656, is preſerved in Scobell's collection, 400. (17)

(17) Sir John Sinclair has given the proportions to be levied upon each county of an aſſeſſment of 70,000 *l.* a month in the year 1660, in his Hiſtory of the Public Revenue, 1 part, 189.

(18) No ſubſidies were granted either by the laity or clergy after 1663, 15 Car. II. c. 9. & 10. The learned Judge has been miſled by the title to the act of the 22 and 23 Car. II. c. 3. in the

by cuſtom, being raiſed by commiſſioners named by parliament, and producing a more certain revenue; from that time forwards we hear no more of ſubſidies, but occaſional aſſeſſments were granted as the national emergencies required. Theſe periodical aſſeſſments, the ſubſidies which preceded them, and the more antient ſcutage, hydage, and talliage, were to all intents and purpoſes a land tax; and the aſſeſſments were ſometimes expreſsly called ſo [p]. Yet a popular opinion has prevailed, that the land tax was firſt introduced in the

[p] Com. journ. 26 Jun. 9 Dec. 1678.

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year 1670, when he declares it was the laſt time of raiſing ſupplies by way of ſubſidy; for the title of it is, "An act to grant a "ſubſidy to his majeſty for ſupply of his extraordinary occaſions." But although, among a great variety of other taxes, 1 *s.* in the pound is to be raiſed upon land, yet the mode of collecting it is totally different from the former ſubſidy aſſeſſment: it is to be levied by exactly the ſame plan and arrangements which were afterwards adopted in the 4 W. & M. And according to the regulations in the ſtatute 4 W. and M. c. 1. and the valuation of eſtates made at that time, the parliament every year at preſent renews the grant of the land-tax, and orders it to be collected. All the material clauſes of the ſtatute in the 22 & 23 Car. II. are copied *verbatim* in that of the 4 W. & M.; the act of Charles is not printed in the common edition of the Statutes at Large, but it is given at length in Keble's edition. And even then this ſcheme of taxing landed property was not a novelty, for it was firſt introduced in the time of the commonwealth. The ſubſtance of this plan may be ſeen in an act for an aſſeſſment to raiſe 60,000*l.* a month in Scobell's acts, 1656, c. 12.

To thoſe who have leiſure and opportunity, it might afford entertainment to inquire what was the difference of the aſſeſſments returned into the exchequer in the years 1656, 1670, and 1692. For beſides the preſent diſproportion in the aſſeſſment neceſſarily ariſing from a more improved cultivation of land in ſome counties, it is commonly ſuppoſed that there was an original inequality in the valuation of eſtates, from the liberality or fraud of the owners and aſſeſſors in their repreſentations of the value, according to their attachment or averſion to the new government.

reign of king William III; becauſe in the year 1692 a new aſſeſſment or valuation of eſtates was made throughout the kingdom: which, though by no means a perfect one, had this effect, that a ſupply of 500000 *l.* was equal to 1*s.* in the pound of the value of the eſtates given in. And, according to this enhanced valuation, from the year 1693 to the preſent, a period of above fourſcore years, the land tax has continued an annual charge upon the ſubject; above half the time at 4*s* in the pound, ſometimes at 3*s*, ſometimes at 2*s*, twice [q] at 1*s*, but without any total intermiſſion. The medium has been 3*s*. 3*d*. in the pound; being equivalent with twenty-three antient ſubſidies; and amounting annually to more than a million and a half of money. The method of [313] raiſing it is by charging a particular ſum upon each county, according to the valuation given in, *A. D.* 1692: and this ſum is aſſeſſed and raiſed upon individuals (their perſonal eſtates, as well as real, being liable thereto) by commiſſioners appointed in the act, being the principal landholders of the county, and their officers (19).

II. THE other annual tax is the malt tax; which is a ſum of 750000 *l.* raiſed every year by parliament, ever ſince 1697, by a duty of 6*d.* in the buſhel on malt, and a proportionable ſum on certain liquors, ſuch as cyder and perry, which might otherwiſe prevent the conſumption of malt. This is under the management of the commiſſioners of the exciſe; and is indeed itſelf no other than an annual exciſe, the nature of which ſpecies of taxation I ſhall preſently ex-

[q] In the years 1732 and 1733.

(19) The commiſſioners are appointed annually in the renewed act; but they cannot execute the office in any county, except in Wales, under a penalty of 50 *l.* unleſs they have ſome eſtate or intereſt in land within the county, of the clear value of 100 *l.* a year, and which was taxed for that ſum at the leaſt the year before. The aſſeſſors and collectors are principal inhabitants appointed by the commiſſioners. See the particular proviſions of the ſtatute in Burn's Juſtice, title, *Land Tax*.

plain: only premiſing at preſent, that in the year 1760 an additional perpetual exciſe of 3 *d. per* buſhel was laid upon malt; to the produce of which a duty of 15 *per cent.* or nearly an additional halfpenny *per* buſhel, was added in 1779 (20): and that in 1763 a proportionable exciſe was laid upon cyder and perry, but ſo new-modelled in 1766, as ſcarce to be worth collecting (21).

THE perpetual taxes are,

I. THE cuſtoms; or the duties, toll, tribute, or tariff, payable upon merchandize exported and imported. The conſiderations upon which this revenue (or the more antient part of it, which aroſe only from exports) was inveſted in the king, were ſaid to be two[r]; 1. Becauſe he gave the ſubject leave to depart the kingdom, and to carry his goods along with him. 2. Becauſe the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchant from pirates. Some have imagined they are

[r] Dyer, 165.

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(20) And in the next year, a further additional duty of 6 *d.* a buſhel was laid upon malt. But by the conſolidation act, 27 Geo. III. c. 13. theſe duties are repealed; and, in lieu of them, 9½ *d.* is laid upon every buſhel of malt in England, and half as much in Scotland. Sir John Sinclair ſtates, that from Michaelmas 1787 to Michaelmas 1788, the net produce of the perpetual exciſe upon malt was 724,786 *l.*; the annual exciſe 603,317 *l.*; the duties upon beer, 1,666,152 *l.*; upon Britiſh ſpirits 509,167 *l.*: ſo that barley yielded a clear revenue of 3,503,422 *l.* 3 *Sinc.* 125.

(21) Though the land-tax is ſuppoſed, and ſtated in the annual act, to raiſe, at 4 *s.* in the pound, an income of 1,989,673 *l.* 7 *s.* 10½ *d.* for England; and 47,954 *l.* 1 *s.* 2 *d.* for Scotland; making in all, 2,037,627 *l.* 9 *s.* 0½ *d.* yet Sir John Sinclair ſhews, with great appearance of accuracy, that it is ſo uniformly deficient, that, upon an average, the whole amount ought not to be eſtimated at more than 1,900,000 *l.* and that the annual malt tax, after two very favourable years, ending at Michaelmas 1788, did not average more than 600,000 *l.* 3 Part, 108. 117.

called

called with us cuſtoms, becauſe they were the inheritance of the king by immemorial uſage and the common law, and not granted him by any ſtatute [s]: but ſir Edward Coke hath clearly ſhewn [t], that the king's firſt claim to them was by grant of parliament 3 Edw. I. though the record thereof is not [314] now extant (22). And indeed this is in expreſs words confeſſed by ſtatute 25 Edw. I. c. 7. wherein the king promiſes to take no cuſtoms from merchants, without the common aſſent of the realm, "ſaving to us and our heirs, the cuſtoms

[s] Dyer. 43. *pl.* 24. [t] 2 Inſt. 58, 59.

(22) Sir Edward Coke cites a letter patent of Edw. I. in which the king recites, that the parliament had granted to him and his heirs *quædam nova conſuetudo* upon wool, ſkins, and leather: but that merchants paid duties and cuſtoms long before, appears from the memorable clauſe in *magna charta*, upon which ſir Edward Coke is there commenting: that clauſe provides, that all merchants ſhall have ſafe conduct throughout England, *ad emendum & vendendum ſine omnibus malis toltetis, per antiquas & rectas conſuetudines*: and he ſays, theſe are ſubſidies or cuſtoms granted by common conſent *pro bono publico*. 2 *Inſt.* 58. They ſeem to have been called cuſtoms, from having been paid from time immemorial; and a memorable ſtatute in the 21 Edw. I. c. 5. makes that diſtinction. It ſtates, that ſeveral people are apprehenſive that the aids, taſks, and prizes, which they had granted for the king's wars and other occaſions, might be turned upon them and their heirs *(en ſervage)* into an act of ſlavery; the king therefore declares and grants, that he will not draw ſuch temporary aids and taxes into a *cuſtom*.

This is a ſtriking and a noble inſtance of a jealous ſpirit of liberty in our anceſtors, and that they were anxious to preſerve thoſe rights which, by *magna charta*, they had ſucceſsfully vindicated.

Lord Coke, both in 2 Inſt. 58, and in 4 Inſt. 29, 30. ſhews from the authorities he cites, that cuſtoms or duties were called in old legal Latin *cuſtuma* and *conſuetudines* indiſcriminately. But he ſeems very deſirous of inculcating the doctrine, that all cuſtoms or duties owe their origin to the authority of parliament; a doctrine, which both before and after his time, the crown was inclined to controvert.

" on wool, ſkins, and leather, formerly granted to us by the " commonalty aforeſaid." Theſe were formerly called the hereditary cuſtoms of the crown; and were due on the exportation only of the ſaid three commodities, and of none other: which were ſtyled the *ſtaple* commodities of the kingdom, becauſe they were obliged to be brought to thoſe ports where the king's ſtaple was eſtabliſhed, in order to be there firſt rated, and then exported [u]. They were denominated in the barbarous Latin of our antient records, *cuſtuma* [v]; not *conſuetudines*, which is the language of our law whenever it means merely uſages. The duties on wool, ſheep-ſkins, or woolfells, and leather, exported, were called *cuſtuma antiqua ſive magna*: and were payable by every merchant, as well native as ſtranger; with this difference, that merchant ſtrangers paid an additional toll, *viz.* half as much again as was paid by natives. The *cuſtuma parva et nova* were an impoſt of 3 *d.* in the pound, due from merchant ſtrangers only, for all commodities as well imported as exported; which was uſually called the alien's duty, and was firſt granted in 31 Edw. I [w]. But theſe antient hereditary cuſtoms, eſpecially thoſe on wool and woolfells, came to be of little account, when the nation became ſenſible of the advantages of a home manufacture, and prohibited the exportation of wool by ſtatute 11 Edw. III. c. 1.

THERE is alſo another very antient hereditary duty belonging to the crown, called the *priſage* or *butlerage* of wines; which is conſiderably older than the cuſtoms, being taken notice of in the great roll of the exchequer, 8 Ric. I. ſtill extant [x]. Priſage was a right of *taking* two tons of wine from every ſhip (Engliſh or foreign) importing into England twenty tons or more; one before, and one behind the maſt: which by charter of Edward I was exchanged into a duty of 2 *s.* for every ton imported by merchant-ſtrangers, and called butlerage, becauſe paid to the king's butler [y].

[315]

[u] Dav. 9.

[v] This appellation ſeems to be derived from the French word *couſtum*, or *coûtum*, which ſignifies toll or tribute, and owes it's own etymology to the word *couſt*, which ſignifies price, charge, or as we have adopted it in Engliſh, *coſt*.

[w] 4 Inſt. 29.

[x] Madox. hiſt. exch. 526. 532.

[y] Dav. 8. 2 Bulſtr. 254. Stat. Eſtr. 16 Edw. II. Com. journ. 27 Apr. 1689.

OTHER

OTHER cuſtoms payable upon exports and imports were diſtinguiſhed into ſubſidies, tonnage, poundage, and other impoſts. Subſidies were ſuch as were impoſed by parliament upon any of the ſtaple commodities before mentioned, over and above the *cuſtuma antiqua et magna*: tonnage was a duty upon all wines imported, over and above the priſage and butlerage aforeſaid: poundage was a duty impoſed *ad valorem*, at the rate of 12 *d.* in the pound, on all other merchandize whatſoever; and the other impoſts were ſuch as were occaſionally laid on by parliament, as circumſtances and times required [z]. Theſe diſtinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of the cuſtoms.

BY theſe we underſtand, at preſent, a duty or ſubſidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by authority of parliament; unleſs where, for particular national reaſons, certain rewards, bounties, or drawbacks, are allowed for particular exports or imports. Thoſe of tonnage and poundage, in particular, were at firſt granted, as the old ſtatutes (and particularly 1 Eliz. c. 19.) expreſs it, for the defence of the realm, and the keeping and ſafeguard of the ſeas, and for the intercourſe of merchandize ſafely to come into and paſs out of the ſame. They were at firſt uſually granted only for a ſtated term of years, as, for two years in 5 Ric. II [a]; but in Henry the ſixth's time, they were granted him for life by a ſtatute in the thirty-firſt year of his reign; and again to Edward IV, for the term of his life alſo: ſince which time they were regularly granted to all his ſucceſſors, for life, ſometimes at the firſt, ſometimes at other ſubſequent parliaments, till the reign of Charles the firſt; when, [316] as the noble hiſtorian expreſſes it [b], his miniſters were not ſufficiently ſolicitous for a renewal of this legal grant. And yet theſe impoſts were imprudently and unconſtitutionally levied and taken, without conſent of parliament, for fifteen years

[z] Dav. 11, 12. [a] Dav. 12. [b] Hiſt. Rebell. b. 3.

together; which was one of the cauſes of thoſe unhappy diſcontents, juſtifiable at firſt in too many inſtances, but which degenerated at laſt into cauſeleſs rebellion and murder. For, as in every other, ſo in this particular caſe, the king (previous to the commencement of hoſtilities) gave the nation ample ſatisfaction for the errors of his former conduct, by paſſing an act [c], whereby he renounced all power in the crown of levying the duty of tonnage and poundage, without the expreſs conſent of parliament; and alſo all power of impoſition upon any merchandizes whatever. Upon the reſtoration this duty was granted to king Charles the ſecond for life, and ſo it was to his two immediate ſucceſſors; but now by three ſeveral ſtatutes, 9 Ann. c. 6. 1 Geo. I. c. 12. and 3 Geo. I. c. 7. it is made perpetual and mortgaged for the debt of the public. The cuſtoms thus impoſed by parliament, are chiefly contained in two books of rates, ſet forth by parliamentary authority [d]; one ſigned by ſir Harbottle Grimſton, ſpeaker of the houſe of commons in Charles the ſecond's time; and the other an additional one ſigned by ſir Spencer Compton, ſpeaker in the reign of George the firſt; to which alſo ſubſequent additions have been made (23). Aliens pay a larger proportion than natural ſub-

[c] 16 Car. I. c. 8. [d] Stat. 12 Car. II. c. 4. 11 Geo. I. c. 7.

(23) In the year 1787, by the 27 Geo. III. c. 13. called the conſolidation act, all the former ſtatutes impoſing duties of cuſtoms and exciſe were repealed with regard to the *quantum* of the duty; and the two books of rates mentioned by the learned Judge, were declared to be of no avail for the future; but all the former duties were conſolidated, and were ordered to be paid according to a new book of rates annexed to that ſtatute. Before this act was paſſed, it could not be ſuppoſed that many perſons, beſide exciſemen and cuſtom-houſe officers, could be acquainted with the duties payable upon the different articles of commerce. Sir John Sinclair ſays, that French wine was liable to fifteen, and French paper to fourteen, different duties, which, of courſe, lay widely diſperſed in ſo many acts of parliament. But now, by this excellent improvement, we can immediately find the duty upon the importation or exportation of any article; or what exciſe duty any commodity is ſubject to, in an alphabetical table. Bullion, wool,

jects, which is what is now generally underſtood by the alien's duty; to be exempted from which is one principal cauſe of the frequent applications to parliaments for acts of naturalization (24).

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wool, and ſome few other commodities, may be imported duty free. All the articles enumerated in the tables or book of rates pay, upon importation or exportation, the ſum therein ſpecified, according to their weight, number, or meaſure. And all other goods and merchandize, not being particularly enumerated or deſcribed, and permitted to be imported and uſed in Great Britain, ſhall pay upon importation 27*l.* 10*s.* *per cent. ad valorem*, or for every 100*l.* of the value thereof; but ſubject to a drawback of 25*l.* *per cent.* upon exportation. Very few commodities pay a duty upon exportation; but where that duty is not ſpecified in the tables, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and ſhipped; but on failure thereof, they are ſubject to a duty of 5*l.* 10*s.* *per cent. ad valorem.* And to prevent frauds in the repreſentation of the value, a very ſimple and equitable regulation is preſcribed by the act, *viz.* the proprietor ſhall himſelf declare the value, and if this ſhould appear not to be a fair and true eſtimate, the goods may be ſeized by the proper officer; and four of the commiſſioners of the cuſtoms may direct that the owner ſhall be paid the price which he himſelf fixed upon them, with an advance of ten *per cent.* beſides all the duty which he may have paid; and they may then order the goods to be publicly ſold, and if they raiſe any ſum beyond what was paid to the owner and the ſubſequent expences, one half of the overplus ſhall be paid to the officer who made the ſeizure, and the other half to the public revenue. This ſtatute is of infinite conſequence to the commercial part of the world; it has reduced an important ſubject from a perfect chaos to ſuch a plain and ſimple form, as to induce every friend to his country to wiſh that ſimilar experiments were made upon other confuſed and entangled branches of our ſtatute law.

(24) By the 24 Geo. III. ſeſſ. 2. c. 16. it was enacted, that the petty cuſtom, or additional duty on all the goods of aliens or ſtrangers, ſhould ceaſe, except thoſe which had been granted to the city of London. The city of London ſtill retains a trifling duty called ſcavage, on the goods of aliens. It is an odious and impolitic tax; and it would be honourable to the city of London to adopt the liberality of the legiſlature, and to relinquiſh it.

THESE

THESE cuſtoms are then, we ſee, a tax immediately paid by the merchant, although ultimately by the conſumer. And yet theſe are the duties felt leaſt by the people; and, if prudently managed, the people hardly conſider that they pay them at all. For the merchant is eaſy, being ſenſible he does not pay them for himſelf; and the conſumer, who really pays them, con-
[317] founds them with the price of the commodity: in the ſame manner as Tacitus obſerves, that the emperor Nero gained the reputation of aboliſhing the tax of the ſale of ſlaves, though he only transferred it from the buyer to the ſeller; ſo that it was, as he expreſſes it, "*remiſſum magis ſpecie, quam vi: quia, "cum venditor pendere juberetur, in partem pretii emptoribus "accreſcebat*[e]." But this inconvenience attends it on the other hand, that theſe impoſts, if too heavy, are a check and cramp upon trade; and eſpecially when the value of the commodity bears little or no proportion to the quantity of the duty impoſed. This in conſequence gives riſe alſo to ſmuggling, which then becomes a very lucrative employment: and it's natural and moſt reaſonable puniſhment, *viz.* confiſcation of the commodity, is in ſuch caſes quite ineffectual; the intrinſic value of the goods, which is all that the ſmuggler has paid, and therefore all that he can loſe, being very inconſiderable when compared with his proſpect of advantage in evading the duty. Recourſe muſt therefore be had to extraordinary puniſhments to prevent it; perhaps even to capital ones: which deſtroys all proportion of puniſhment[f], and puts murderers upon an equal footing with ſuch as are really guilty of no natural, but merely a poſitive, offence.

THERE is alſo another ill conſequence attending high impoſts on merchandize, not frequently conſidered, but indiſputably certain; that the earlier any tax is laid on a commodity, the heavier it falls upon the conſumer in the end: for every trader, through whoſe hands it paſſes, muſt have a profit, not only upon the raw material and his own labour and time in preparing it, but alſo upon the very tax itſelf, which he advances to the government; otherwiſe he loſes the uſe

[e] Hiſt. l. 13. [f] Monteſq. Sp. L. b. 13. c. 8.

and

and intereſt of the money which he ſo advances. To inſtance in the article of foreign paper. The merchant pays a duty upon importation, which he does not receive again till he ſells the commodity, perhaps at the end of three months. He is therefore equally entitled to a profit upon that duty [318] which he pays at the cuſtom-houſe, as to a profit upon the original price which he pays to the manufacturer abroad; and conſiders it accordingly in the price he demands of the ſtationer. When the ſtationer ſells it again, he requires a profit of the printer or bookſeller upon the whole ſum advanced by him to the merchant: and the bookſeller does not forget to charge the full proportion to the ſtudent or ultimate conſumer; who therefore does not only pay the original duty, but the profits of theſe three intermediate traders, who have ſucceſſively advanced it for him. This might be carried much farther in any mechanical, or more complicated, branch of trade.

II. DIRECTLY oppoſite in it's nature to this is the exciſe duty; which is an inland impoſition, paid ſometimes upon the conſumption of the commodity, or frequently upon the retail ſale, which is the laſt ſtage before the conſumption. This is doubtleſs, impartially ſpeaking, the moſt œconomical way of taxing the ſubject: the charges of levying, collecting, and managing the exciſe duties being conſiderably leſs in proportion than in other branches of the revenue (25). It alſo renders the commodity cheaper to the conſumer, than charging it with cuſtoms to the ſame amount would do; for the reaſon juſt now given, becauſe generally paid in a much later ſtage of it. But, at the ſame time, the rigour and arbitrary proceedings of exciſe-laws ſeem hardly compatible with the temper of a free nation. For the frauds that might be com-

(25) In the year 1796, the expence of collecting the cuſtoms was 8¾ *per cent.* nearly upon the net produce, the duties of exciſe 5½, ſtamps 5½, land-tax and aſſeſſed taxes 3½, ſalt 7 $\frac{9}{16}$, and that the average expence of collecting the whole revenue was leſs than 6$\frac{1}{5}$. See the 4th report of the committee on finance, 1797, p. 6. and p. 326. n. 37, in this volume, where the whole receipts and charges are given at length.

mitted

mitted in this branch of the revenue, unleſs a ſtrict watch is kept, make it neceſſary, wherever is eſtabliſhed, to give the officers a power of entering and ſearching the houſes of ſuch as deal in exciſeable commodities, at any hour of the day, and, in many caſes, of the night likewiſe. And the proceedings in caſe of tranſgreſſions are ſo ſummary and ſudden, that a man may be convicted in two days time in the penalty of many thouſand pounds by two commiſſioners or juſtices of the peace; to the total excluſion of the trial by jury, and diſregard of the common law(26). For which reaſon, though lord
[319] Clarendon tells us[g], that to his knowlege the earl of Bedford (who was made lord treaſurer by king Charles the firſt, to oblige his parliament) intended to have ſet up the exciſe in England, yet it never made a part of that unfortunate prince's revenue; being firſt introduced, on the model of the Dutch prototype, by the parliament itſelf after it's rupture with the crown. Yet ſuch was the opinion of it's general unpopularity, that when in 1642, "aſperſions were caſt by "malignant perſons upon the houſe of commons, that they "intended to introduce exciſes, the houſe for it's vindication "therein did declare, that theſe rumours were falſe and ſcan-"dalous; and that their authors ſhould be apprehended and "brought to condign puniſhment[h]." However, it's original[i] eſtabliſhment was in 1643, and it's progreſs was gradual;

[g] Hiſt. b. 3.

[h] Com. Journ. 8 Oct. 1642.

[i] The tranſlator and continuator of Petavius's chronological hiſtory (Lond. 1659. fol.) informs us, that it was firſt moved for, 28 Mar. 1643, by Mr. Prynne. And it appears from the journals of the commons, that on that day the houſe

(26) See the juriſdiction of the commiſſioners and juſtices of the peace in caſes of exciſe in Burn's Juſtice, title *Exciſe*. The grievances of the exciſe perhaps exiſt more in apprehenſion than in reality. Actions and proſecutions againſt officers, commiſſioners, and juſtices, for miſconduct in exciſe caſes, are very rarely heard of in courts of law. It is certainly an evil that a fair dealer cannot have the benefit of any ſecret improvement in the management of his trade or manufactory; yet perhaps it is more than an equivalent to the public at large, that by the ſurvey of the exciſe, the commodity is preſerved from many ſhameful adulterations, as experience has fully proved ſince wine was made ſubject to the exciſe laws.

being at firſt laid upon thoſe perſons and commodities, where it was ſuppoſed the hardſhip would be leaſt perceivable, *viz.* the makers and venders of beer, ale, cyder, and perry [k], and the royaliſts at Oxford ſoon followed the example of their brethren at Weſtminſter by impoſing a ſimilar duty; both ſides proteſting that it ſhould be continued no longer than to the end of the war, and then be utterly aboliſhed [l]. But the parliament at Weſtminſter ſoon after impoſed it on fleſh, wine, tobacco, ſugar, and ſuch a multitude of other commodities, that it might fairly be denominated general: in purſuance of the plan laid down by Mr. Pymme (who ſeems to have been the father of the exciſe) in his letter to ſir John Hotham [m], ſignifying, "that they had proceeded in the exciſe to many particulars, and intended to go on farther; but that it would be neceſſary to uſe the people to it by little and little." And afterwards, when the nation had [320] been accuſtomed to it for a ſeries of years, the ſucceeding champions of liberty boldly and openly declared, "the impoſt of exciſe to be the moſt eaſy and indifferent levy that could be laid upon the people [n]:" and accordingly continued it during the whole uſurpation. Upon king Charles's return, it having then been long eſtabliſhed and it's produce well known, ſome part of it was given to the crown, in 12 Car. II. by way of purchaſe (as was before obſerved) for the feodal tenures and other oppreſſive parts of the hereditary revenue. But, from it's firſt original to the preſent time, it's very name has been odious to the people of England. It has nevertheleſs been impoſed on abundance of other commodities in the reigns of king William III, and every ſucceeding prince,

houſe reſolved itſelf into a committee to conſider of raiſing money, in conſequence of which the exciſe was afterwards voted. But Mr Prynne was not a member of parliament till 7 Nov. 1648; and publiſhed in 1654, "A proteſtation againſt the illegal, deteſtable, and oft condemned tax and extortion of exciſe in general." It is probably therefore a miſtake of the printer for Mr. Pymme, who was intended for chancellor of the exchequer under the earl of Bedford. Lord Clar. b. 7.

[k] Com. Journ. 17 May 1643.

[l] Lord Clar. b. 7.

[m] 30 May 1643. Dugdale of the troubles, 120.

[n] Ord. 14 Aug. 1649 c. 50. Scobel. 72. Stat. 1656, c. 19. Scobel. 453.

to

to ſupport the enormous expences occaſioned by our wars on the continent. Thus brandies and other ſpirits are now exciſed at the diſtillery; printed ſilks and linens, at the printer's; ſtarch and hair powder, at the maker's; gold and ſilver wire, at the wiredrawer's; plate in the hands of the vendor, who pays yearly for a licenſe to ſell it; lands and goods ſold by auction, for which a pound-rate is payable by the auctioneer, who alſo is charged with an annual duty for his licenſe; and coaches and other wheel carriages, for which the occupier is exciſed, though not with the ſame circumſtances of arbitrary ſtrictneſs, as in moſt of the other inſtances. To theſe we may add coffee and tea, chocolate and cocoa paſte, for which the duty is paid by the retailer; all artificial wines, commonly called ſweets; paper and paſteboard, firſt when made, and again if ſtained or printed; malt as before-mentioned; vinegars; and the manufacture of glaſs; for all which the duty is paid by the manufacturer; hops, for which the perſon that gathers them is anſwerable; candles and ſoap, which are paid for at the maker's; malt liquors brewed for ſale, which are exciſed at the brewery; cyder and perry, at the vendor's; and leather and ſkins, at the tanner's. A liſt, which no friend to his country would wiſh to ſee farther increaſed.

[321] III. I PROCEED therefore to a third duty, namely that upon ſalt; which is another diſtinct branch of his majeſty's extraordinary revenue, and conſiſts in an exciſe of 3 *s.* 4 *d.* *per* buſhel impoſed upon all ſalt, by ſeveral ſtatutes of king William and other ſubſequent reigns. This is not generally called an exciſe, becauſe under the management of different commiſſioners: but the commiſſioners of the ſalt duties have by ſtatute 1 Ann. c. 21. the ſame powers, and muſt obſerve the ſame regulations, as thoſe of other exciſes. This tax had uſually been only temporary; but by ſtatute 26 Geo. II. c. 3. was made perpetual (27).

(27) For particular regulations reſpecting the duty on ſalt, ſee Burn's Juſt. title, *Exciſe*, Salt.

IV. ANOTHER

IV. ANOTHER very conſiderable branch of the revenue is levied with greater chearfulneſs, as, inſtead of being a burden, it is a manifeſt advantage to the public. I mean the poſt-office, or duty for the carriage of letters. As we have traced the original of the exciſe to the parliament of 1643, ſo it is but juſtice to obſerve that this uſeful invention owes it's firſt legiſlative eſtabliſhment to the ſame aſſembly. It is true, there exiſted poſt-maſters in much earlier times: but I apprehend their buſineſs was confined to the furniſhing of poſt-horſes to perſons who were deſirous to travel expeditiouſly, and to the diſpatching of extraordinary pacquets upon ſpecial occaſions. King James I originally erected a poſt-office under the control of one Matthew de Queſter or de l'Equeſter for the conveyance of letters to and from foreign parts; which office was afterwards claimed by lord Stanhope [o], but was confirmed and continued to William Frizell and Thomas Witherings by king Charles I, *A. D.* 1632, for the better accommodation of the Engliſh merchants [p]. In 1635, the ſame prince erected a letter-office for England and Scotland, under the direction of the ſame Thomas Witherings, and ſettled certain rates of poſtage [q]: but this extended only to a few of the principal roads, the times of carriage were uncertain, and the poſt-maſters on each road were required to furniſh the mail with horſes at the rate of 2½ *d.* a mile. [322] Witherings was ſuperſeded, for abuſes in the execution of both his offices, in 1640; and they were ſequeſtered into the hands of Philip Burlamachy, to be exerciſed under the care and overſight of the king's principal ſecretary of ſtate [r]. On the breaking out of the civil war, great confuſions and interruptions were neceſſarily occaſioned in the conduct of the letter-office. And, about that time, the outline of the preſent more extended and regular plan ſeems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney general to the commonwealth after the murder of king Charles. He was chairman of a committee in 1642 for con-

[o] Latch. Rep. 87.
[p] 19 Rym. *Fœd.* 385.
[q] *Ibid.* 650. 20 Rym. 192.
[r] 20 Rym. 429.

ſidering

ſidering what rates ſhould be ſet upon inland letters [s]; and afterwards appointed poſt-maſter by an ordinance of both the houſes [t], in the execution of which office he firſt eſtabliſhed a *weekly* conveyance of letters into *all* parts of the nation [u]; thereby ſaving to the public the charge of maintaining poſt-maſters to the amount of 7000 *l. per annum.* And, his own emoluments being probably very conſiderable, the common council of London endeavoured to erect another poſt-office in oppoſition to his; till checked by a reſolution of the houſe of commons [w], declaring that the office of poſt-maſter is and ought to be in the ſole power and diſpoſal of the parliament. This office was afterwards farmed by one Manley in 1654 [x]. But, in 1657, a regular poſt-office was erected by the authority of the protector and his parliament (28), upon nearly the ſame model as has been ever ſince adopted, and with the ſame rates of poſtage as continued till the reign of queen Anne [y]. After the reſtoration a ſimilar office, with ſome improvements, was eſtabliſhed by ſtatute 12 Car. II. c. 35. but the rates of letters were altered, and ſome farther regulations added, by the ſtatutes 9 Ann. c. 10. 6 Geo. I. c. 21.

[s] Com. Journ. 28 Mar. 1642.
[t] *Ibid.* 7 Sept. 1644.
[u] *Ibid.* 21 Mar. 1649.
[w] *Ibid.* 21 Mar. 1649.
[x] Scobell. 358.
[y] Com. Journ. 9 June 1657. Scobell. 511.

(28) The preamble of the ordinance ſtates, that the eſtabliſhing one general poſt-office, beſides the benefit to commerce, and the convenience of conveying public diſpatches, "will be the beſt "means to diſcover and prevent many dangerous and wicked de-"ſigns againſt the commonwealth."

The policy of having the correſpondence of the kingdom under the inſpection of government is ſtill continued; for, by a warrant from one of the principal ſecretaries of ſtate, letters may be detained and opened; but if any perſon ſhall wilfully detain or open a letter delivered to the poſt-office without ſuch authority, he ſhall forfeit 20 *l.* and be incapable of having any future employment in the poſt-office. 9 *Ann. c.* 10. *ſ.* 40. But it has been decided, that no perſon is ſubject to this penalty but thoſe who are employed in the poſt-office. 5 *T. R.* 101.

26 Geo. II. c. 12. 5 Geo. III. c. 25. & 7 Geo. III. c. 50. and penalties were enacted, in order to confine the carriage of letters to the public office only, except in ſome few caſes: a proviſion which is abſolutely neceſſary; for nothing but an excluſive right can ſupport an office of this ſort: many [323] rival independent offices would only ſerve to ruin one another. The privilege of letters coming free of poſtage, to and from members of parliament, was claimed by the houſe of commons in 1660, when the firſt legal ſettlement of the preſent poſt-office was made [z]; but afterwards dropped [a] upon a private aſſurance from the crown that this privilege ſhould be allowed the members [b] (29). And accordingly a warrant was conſtantly iſſued to the poſt-maſter-general [c], directing the allowance thereof to the extent of two ounces in weight: till at length it was expreſsly confirmed by ſtatute 4 Geo. III. c. 24.; which adds many new regulations, rendered neceſſary by the great abuſes crept into the practice of franking (30):

[z] Com. Journ. 17 Dec. 1660.
[a] *Ibid.* 22 Dec. 1660.
[b] *Ibid.* 16 Apr. 1735.
[c] *Ibid.* 26 Feb. 1734.

(29) The following account of it in the 23 vol. Parl. Hiſt. p. 56 is curious, and proves what originally were the ſentiments of the two houſes reſpecting this privilege. "Colonel Titus reported "the bill for the ſettlement of the poſt-office, with the amendments: "Sir Walter Carle delivered a proviſo for the letters of all mem- "bers of parliament to go free, during their ſitting: Sir Heneage "Finch ſaid, It was a *poor mendicant proviſo, and below the honour "of the houſe.* Mr. Prynn ſpoke alſo againſt the proviſo: Mr. "Bunckley, Mr. Boſcawen, Sir George Downing, and Serjeant "Charlton, for it; the latter ſaying, 'The council's letters went "free.' The queſtion being called for, the ſpeaker, Sir Har- "bottle Grimſtone, was unwilling to put it; ſaying, *he was "aſhamed of it*; nevertheleſs the proviſo was carried, and made "part of the bill, which was ordered to be ingroſſed." This proviſo the lords diſagreed to, and left it out of the bill; and the commons agreed to their amendment. 3 *Hatſ.* 82.

(30) And that the great loſs to the public revenue by the exerciſe of this privilege might be farther diminiſhed, the 24 Geo. III.

whereby the annual amount of franked letters had gradually increaſed, from 23600 *l.* in the year 1715, to 170700 *l.* in the year 1763 [d]. There cannot be deviſed a more eligible method than this, of raiſing money upon the ſubject: for therein both the government and the people find a mutual benefit. The government acquires a large revenue; and the people do their buſineſs with greater eaſe, expedition, and cheapneſs, than they would be able to do if no ſuch tax (and of courſe no ſuch office) exiſted (31).

[d] *Ibid.* 28 Mar. 1764.

ſeſſ. 2. c. 37. provides, that no letter ſhall go free, unleſs the member ſhall write the whole of the ſuperſcription, and ſhall add his own name, and that of the poſt-town from which the letter is intended to be ſent, and the day of the month in words at length, beſides the year, which may be in figures; and unleſs the letter ſhall be put into the poſt-office of the place, ſo that it may be ſent on the day upon which it is dated. And no letter ſhall go free directed to a member of either houſe, unleſs it is directed to him where he ſhall actually be at the delivery thereof; or to his reſidence in London, or to the lobby of his houſe of parliament. And if any perſon ſhall fraudulently counterfeit or alter ſuch ſuperſcription, he ſhall be guilty of felony, and ſhall be tranſported for ſeven years.

By the 35 Geo. III. c. 53. the privilege of franking is ſtill farther reſtrained. By that ſtatute, no letter directed by or to any member ſhall go free, which ſhall exceed one ounce in weight, nor any letter directed by a member, unleſs he is within twenty miles of the poſt-town from which it is to be ſent on the day, or the day before the day, on which it is put into the poſt-office. And no member ſhall ſend more than ten, or receive more than fifteen letters in one day, free from poſtage. Single letters ſent and received by the non-commiſſioned officers and private men in the navy and army, under certain reſtrictions, ſhall be ſubject only to the poſtage of one penny each.

(31) It was determined ſo long ago as the 13 W. III. by three of the judges of the court of King's Bench, though contrary to the

V. A FIFTH branch of the perpetual revenue conſiſts in the ſtamp duties, which are a tax impoſed upon all parchment and paper, whereon any legal proceedings, or private inſtruments of almoſt any nature whatſoever, are written; and alſo upon licenſes for retailing wines, letting horſes to hire, and for certain other purpoſes; and upon all almanacks, news-papers, advertiſements, cards, dice, and pamphlets containing leſs than ſix ſheets of paper. Theſe impoſts are very various, according to the nature of the thing ſtamped,

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the pertinacious opinion of lord C. J. Holt, that no action could be maintained againſt the poſtmaſter-general, for the loſs of bills or articles ſent in letters by the poſt. 1 *Ld. Raym.* 646. *Comyns.* 100, &c. A ſimilar action was brought againſt lord le Deſpencer and Mr. Carteret, poſtmaſters-general, in 1778, to recover a bank-note of 100*l.* which had been ſent by the poſt and was loſt. Lord Mansfield delivered the opinion of the court, and proved, with ſuch perſpicuity and ability, that there was no reſemblance or analogy between the poſtmaſters and a maſter carrier, and that no action for any loſs in the poſt-office could be brought againſt any perſon, except him by whoſe actual negligence the loſs accrued, that this point ſeems as fully eſtabliſhed, as if it had been declared by the full authority of parliament. *Cowp.* 754.

For this reaſon it is recommended, by the ſecretary of the poſt-office, to cut bank-notes, and to ſend one half at a time. This is the only ſafe mode of ſending bank-notes, as the bank would never pay the holder of that half which had been fraudulently obtained.

Many attempts have been made by poſtmaſters in country towns, to charge a halfpenny or a penny a letter upon delivery at the houſes in the town above the parliamentary rates, under pretence that they were not obliged to carry the letters out of the office *gratis*; but it has been repeatedly decided, that ſuch a demand is illegal, and that they are bound to deliver the letters to the inhabitants within the uſual and eſtabliſhed limits of the town, without any addition to the rate of poſtage. 5 *Burr.* 2709. 2 *Bl. Rep.* 906. *Cowp.* 182.

rising gradually from a penny to ten pounds. This is also a tax, which though in some instances it may be heavily felt, by greatly increasing the expence of all mercantile as well as legal proceedings, yet (if moderately imposed) is of service to the
[324] public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, by marks perceptible to none but themselves, a man that would forge a deed of king William's time, must know and be able to counterfeit the stamp of that date also. In France and some other countries the duty is laid on the contract itself, not on the instrument in which it is contained; (as, with us too, besides the stamps on the indentures, a tax is laid by statute 8 Ann. c. 9. of *6 d.* in the pound, upon every apprentice-fee, if it be 50 *l.* or under; and 1 *s.* in the pound, if it be a greater sum,) but this tends to draw the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage [e] (32). Our general method answers the purposes of the state as well, and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 & 6 W. & M. c. 21. and they have since in many instances been increased to ten times their original amount (33).

[e] Sp. of L. b. xiii. c. 9.

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(32) It is considered a rule of construction of revenue acts, in ambiguous cases, to lean in favour of the revenue. This rule is agreeable to good policy and the public interests; but, beyond that, which may be regarded as established law, no one can ever be said to have an undue advantage in our courts.

(33) And perhaps by ten different acts of parliament. It is certainly true, that the items of seven different long statutes must be picked out and summed up, to produce the present stamp duty upon an indenture, lease, or bond. One cannot but express surprise,

VI. A SIXTH branch is the duty upon houſes and windows. As early as the conqueſt mention is made in domeſday book of fumage or fuage, vulgarly called ſmoke farthings; which were paid by cuſtom to the king for every chimney in the houſe. And we read that Edward the black prince, (ſoon after his ſucceſſes in France,) in imitation of the Engliſh cuſtom, impoſed a tax of a florin upon every hearth in his French dominions[f]. But the firſt parliamentary eſtabliſhment of it in England was by ſtatute 13 & 14 Car. II. c. 10. whereby an hereditary revenue of 2 *s.* for every hearth, in all houſes paying to church and poor, was granted to the king for ever. And, by ſubſequent ſtatutes for the more regular aſſeſſment of this tax, the conſtable and two other ſubſtantial inhabitants of the pariſh, to be appointed yearly, (or the ſurveyor, appointed by the crown, together with ſuch conſtable or other public officer,) were, once in every year, empowered to view the inſide of every houſe in the pa- [325]
riſh. But, upon the revolution, by ſtatute 1 W. & M. ſt. 1. c. 10. hearth-money was declared to be "not only a great "oppreſſion to the poorer ſort, but a badge of ſlavery upon "the whole people, expoſing every man's houſe to be en-"tered into, and ſearched at pleaſure, by perſons unknown

[f] Mod. Un. Hiſt. xxiii. 463. Spelm. Gloſſ. *tit. Fuage.*

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priſe, that each new ſtamp-act has not conſolidated the duties impoſed upon the reſpective articles by former ſtatutes. When a deed or inſtrument is produced in court, no one can ſay whether it is duly ſtamped or not, but by collecting together, with a great probability of an error, all the duties which lie diſperſed in the various ſtamp-acts prior to it's date.

If each ſtamp-act declared the whole amount of the ſtamp at the time, it would prevent much confuſion and vexation in a ſubject of the higheſt importance. But till this plan is adopted by the legiſlature, Dr. Burn, in the title *Stamps*, will be our readieſt, if not our ſureſt, guide.

" to him; and therefore, to erect a laſting monument of " their majeſties goodneſs in every houſe in the kingdom, " the duty of hearth-money was taken away and aboliſhed." This monument of goodneſs remains among us to this day: but the proſpect of it was ſomewhat darkened, when in ſix years afterwards by ſtatute 7 W. III. c. 18. a tax was laid upon all houſes (except cottages) of 2 *s.* now advanced to 3 *s.* *per annum*, and a tax alſo upon all windows, if they exceeded nine, in ſuch houſe. Which rates have been from time to time[s] varied, being now extended to all windows exceeding ſix; and power is given to ſurveyors, appointed by the crown, to inſpect the outſide of houſes, and alſo to paſs through any houſe two days in the year, into any court or yard, to inſpect the windows there. A new duty from 6*d.* to 1 *s.* in the pound was alſo impoſed by ſtatutes 18 Geo. III. c. 26. and 19 Geo. III. c. 59. on every dwelling-houſe inhabited, together with the offices and gardens therewith occupied: which duty, as well as the former, is under the direction of the commiſſioners of the land-tax (34).

VII. THE ſeventh branch of the extraordinary perpetual revenue is a duty of 21 *s.* *per annum* for every male ſervant retained or employed in the ſeveral capacities ſpecifically mentioned in the act of parliament, and which almoſt amount to an univerſality, except ſuch as are employed in huſbandry, trade, or manufactures. This was impoſed by ſtatute 17 Geo. III. c. 39. amended by 19 Geo. III. c. 59.

[s] Stat. 20 Geo. II. c. 3. 31 Geo. II. c. 22. 2 Geo. III. c. 8. 6 Geo. III. c. 38.

(34) The tax upon windows has been much increaſed by the commutation act the 24 Geo. III. ſeſſ. 2. c. 38. and by the 37 Geo. III. c. 105. beſides a general addition of 20 *per cent.* upon the groſs amount.

See the ſubject particularly ſtated in Burn, tit. *Houſe.*

and

and is under the management of the commiſſioners of the land and window tax (35).

VIII. AN eighth branch is the duty ariſing from licenſes to hackney coaches and chairs in London, and the parts adjacent. In 1654 two hundred hackney coaches were allowed within London, Weſtminſter, and ſix miles round, under the direction of the court of aldermen [h]. By ſtatute 13 & 14 Car. II. c. 2. four hundred were licenſed; and the money ariſing thereby was applied to repairing the ſtreets [i]. This number was increaſed to ſeven hundred by ſtatute 5 W. & M. c. 22. and the duties veſted in the crown: and by the ſtatute 9 Ann. c. 23. and other ſubſequent ſtatutes for their government [j], there are now a thouſand licenſed coaches and four hundred chairs. This revenue is governed by commiſſioners of it's own, and is, in truth, a benefit to the ſubject; as the expence of it is felt by no individual, and it's neceſſary regulations have eſtabliſhed a competent juriſ- [326] diction, whereby a very refractory race of men may be kept in ſome tolerable order (36).

IX. THE ninth and laſt branch of the king's extraordinary perpetual revenue is the duty upon offices and penſions; conſiſting in an annual payment of 1 *s.* in the pound (over and above all other duties [k]) out of all ſalaries, fees, and per-

[h] Scobell. 313.
[i] Com. Journ. 14 Feb. 1661.
[j] 10 Ann. c. 19. § 158. 12 Geo. I. c. 15. 7 Geo. III. c. 44. 10 Geo. III. c. 44. 11 Geo. III. c. 24. 28. 12 Geo. III. c. 49.
[k] Previous to this, a deduction of 6 *d.* in

(35) By the 25 Geo. III. c. 43. the former taxes upon ſervants were repealed, and freſh duties were impoſed. Theſe have ſince been increaſed by the 37 Geo. III. c. 107. For a particular ſtatement; ſee Burn.

(36) In the year 1770 one thouſand hackney coaches were licenſed, for each of which the proprietors paid a tax of 5 *s.* a week; by the 24 Geo. III. ſeſſ. 2. c. 27. that duty was doubled; ſo from this article government derives a revenue of 26,000 *l.* a year. In conſequence of ſo great an increaſe in the duty upon them, the fares were altered by 26 Geo. III. c. 7. by which ſtatute, explained by the 32 Geo. III. c. 47. the preſent fares were eſtabliſhed. See Burn, tit. *Hackney Coaches*.

quiſites, of offices and penſions payable by the crown, exceeding the value of 100 *l. per annum.* This highly popular taxation was impoſed by ſtatute 31 Geo. II. c. 22. and is under the direction of the commiſſioners of the land tax.

THE clear net produce of theſe ſeveral branches of the revenue, after all charges of collecting and management paid, amounts at preſent annually to about ſeven millions and three quarters ſterling; beſides more than two millions and a quarter raiſed by the land and malt tax (37). How

in the pound was charged on all penſions and annuities, and all ſalaries, fees, and wages of all offices of profit granted by or derived from the crown; in order to pay the intereſt at the rate of three *per cent.* on one million, which was raiſed for diſcharging the debts of the civil liſt by ſtatutes 7 Geo. I. ſt. 1. c 27. 11 Geo. I. c. 17. and 12 Geo. I. c. 2. This million, being charged on this particular fund, is not conſidered as any part of the national debt.

(37) Since this was written by the author, that ſum has been greatly augmented; for the following is a view of the revenues of the Britiſh empire for the year 1796, taken from the Fourth Report of the committee on finance in 1797:

	Groſs Receipt.	Drawbacks, Repayments, Allowances, and Bounties.	Charges of Management.	Net Produce of the Revenues.
	£.	£.	£.	£.
Cuſtoms	6,381,902	1,457,352	391,061	4,533,489
Exciſe	10,960,425	1,259,940	504,914	9,155,571
Land and aſſeſſed taxes	5,571,893	—	148,553	3,423,340
Stamps	1,904,092	38,175	92,941	1,772,976
Salt	454,378	16,984	31,994	405,400
Hackney coaches	26,146	—	2,256	23,890
Hawkers and Pedlars	7,882	—	2,806	5,076
	23,306,718	2,812,451	1,174,525	19,319,742
Poſt-Office	—	—	—	534,469
6*d.* on the £. on penſions	—	—	—	46,525
1*s.* on the £. on ſalaries	—	—	—	29,643
Seizures,	—	—	—	10,282
Arrears of taxes,	—	—	—	1,996
Fees collected from regulated offices in the exchequer	—	—	—	60,000
Sundry ſmall ſums	—	—	—	1,609
Compoſition by the Bank of England in lieu of ſtamps	—	—	—	12,000
Produce of the lottery 1796, excluſive of prizes	278,751	—	14,000	264,751
Grand total	—	—	—	20,281,017

And

theſe immenſe ſums are appropriated, is next to be conſidered. And this is, firſt and principally, to the payment of the intereſt of the national debt.

IN order to take a clear and comprehenſive view of the nature of this national debt, it muſt firſt be premiſed, that after the revolution, when our new connections with Europe introduced a new ſyſtem of foreign politics, the expences of the nation, not only in ſettling the new eſtabliſhment, but in maintaining long wars, as principals, on the continent, for the ſecurity of the Dutch barrier, reducing the French monarchy, ſettling the Spaniſh ſucceſſion, ſupporting the houſe of Auſtria, maintaining the liberties of the Germanic body, and other purpoſes, increaſed to an unuſual degree: inſomuch that it was not thought adviſable to raiſe all the expenſes of any one year by taxes to be levied within that year, leſt the unaccuſtomed weight of them ſhould create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their poſterity, by borrowing immenſe ſums for the current ſervice of the ſtate, and to lay no more taxes upon the ſubject than would ſuffice to pay the annual intereſt of the ſums ſo borrowed: by this means converting the principal debt into a new ſpecies of property, transferable [327] from one man to another at any time and in any quantity. A ſyſtem which ſeems to have had it's original in the ſtate of Florence, *A. D.* 1344: which government then owed about 60000*l.* ſterling: and, being unable to pay it, formed the principal into an aggregate ſum, called metaphorically a *mount* or *bank*, the ſhares whereof were transferable like our ſtocks, with intereſt at 5 *per cent*, the prices varying according to the exigencies of the ſtate[1]. This policy of the Engliſh parliament

[1] *Pro tempore, pro ſpe, pro commodo, minuitur eorum pretium atque augeſcit.* Aretin. See Mod. Un. Hiſt. xxxvi. 116.

And after paying the expences of the civil government in Scotland, bounties for national objects, and other grants, there was paid into the exchequer 19,010,435*l.*

laid

laid the foundation of what is called the national debt: for a few long annuities created in the reign of Charles II. will hardly deſerve that name. And the example then ſet has been ſo cloſely followed during the long wars in the reign of queen Anne, and ſince, that the capital of the national debt (funded and unfunded) amounted at the cloſe of the ſeſſion in June 1777, to about an hundred and thirty-ſix millions (38): to pay

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(38) The national debt in 1755, previous to the French war, was £. 72,289,000; Intereſt £. 2,654,000

In January 1776, before the American war, it was 123,964,000; ditto 4,411,000

In 1786, previous to which the whole debt of the laſt war was not funded, it was 239,154,000; ditto 9,275,000

See a Brief Examination into the State of the Revenue.

But the ſelect committee on finance, in March 1797, reported that the total amount of the public debts, on the 5th of Jan. 1793, in funded capital, was - £. 238,231,248

The annual intereſt and charge of management amounted then to - - - £. 9,325,866

The public funded debt upon the 5th of January 1797 was £. 327,071,370

The annual intereſt and charge of that debt was	12,507,489
The annual ſum appropriated for it's reduction	1,923,154
The total annual charge of the public debt, on the 5th of January 1797 - -	£. 14,430,643

But in the above total is not included the amount of ſtock created by funding certain navy, victualling, tranſport, and exchequer bills in the courſe of the ſeſſion, nor by the loan of 18 millions for the year 1797, amounting together to £. 41,825,744

The annual intereſt and charge of which ſum is	1,732,992	14	0
The annual ſum appropriated for it's reduction	418,257	7	0
	£. 2,151,250	1	0

See Firſt Report, p. 5, 6, 7.

By

the intereſt of which, together with certain annuities for lives and years, and the charges of management (39), amounting annually to upwards of four millions and three quarters, the extraordinary revenues juſt now enumerated (excepting only the land-tax and annual malt-tax) are in the firſt place mortgaged, and made perpetual by parliament. Perpetual, I ſay; but ſtill redeemable by the ſame authority that impoſed them: which, if it at any time can pay off the capital, will aboliſh thoſe taxes which are raiſed to diſcharge the intereſt.

BY this means the quantity of property in the kingdom is greatly increaſed in idea, compared with former times: yet, if we coolly conſider it, not at all increaſed in reality. We may boaſt of large fortunes, and quantities of money in the funds. But where does this money exiſt? It exiſts only in name, in paper, in public faith, in parliamentary ſecurity: and that is undoubtedly ſufficient for the creditors of the public to rely on. But then what is the pledge, which the public faith has pawned for the ſecurity of theſe debts? The land, the trade, and the perſonal induſtry of the ſubject; from which the money muſt ariſe that ſupplies the ſeveral taxes. In theſe therefore, and theſe only, the property of the public creditors does really and intrinſically exiſt: and of courſe the [328] land, the trade, and the perſonal induſtry of individuals, are diminiſhed in their true value juſt ſo much as they are pledged to anſwer. If A's income amounts to 100 *l. per annum*; and

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By 35 Geo. III. c. 93. proviſion was made for guaranteeing the payment of the dividends on a loan to the Emperor of 4,600,000*l.* under the authority of which ſtatute there has been created in capital ſtock 3 per cents. - - £. 3,833,333 6 8

And in annuities for 25 years from 1ſt May 1794 £. 230,000 0 0

See Firſt Report, p. 8.

(39) The number of officers employed in collecting this vaſt revenue, Sir John Sinclair eſtimates at 12,500. 3 Part, 157.

In France the revenue officers amount to 250,000. *Ib.* 156.

he

he is ſo far indebted to B, that he pays him 50 *l. per annum* for his intereſt; one half of the value of A's property is tranſferred to B the creditor. The creditor's property exiſts in the demand which he has upon the debtor, and no where elſe; and the debtor is only a truſtee to his creditor for one half of the value of his income. In ſhort, the property of a creditor of the public conſiſts in a certain portion of the national taxes: by how much therefore he is the richer, by ſo much the nation, which pays theſe taxes, is the poorer (40).

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(40) It is a very erroneous notion indeed to ſuppoſe, that the property of the kingdom is increaſed by national debts, contracted in conſequence of the expences of war. On the contrary, the principal of the debt is the exact amount of the property which the nation has loſt from it's capital for ever. The American war coſt the nation 116 millions ſterling, and the effect is preciſely the ſame as if ſo much of it's wealth and treaſure in corn, cattle, cloth, ammunition, coin, &c. had been collected together, and thrown into the ſea, beſides the loſs accruing from the deſtruction of many of it's moſt productive hands. When this property is conſumed, it never can be retrieved, though induſtry and care may acquire and accumulate new ſtores. Such a ſupply, by no mode of taxation that has yet been deviſed, could be collected at once, without exhauſting the patience and endurance of the people. But by the method of funding, the ſubjects are induced to ſuppoſe, that their ſuffering conſiſts only in the payment of the yearly intereſt of this immenſe waſte. The ruin is completed before the intereſt commences, for that is paid by the nation to the nation, and returns back to it's former channel and circulation; like the balls in a tennis court, however they may be toſſed from one ſide to the other, their ſum and quantity, within the court, continue the ſame. The extravagance of individuals naturally ſuggeſted the ſyſtem of funding public debts. When a man cannot ſatisfy the immediate demands of his creditor, it is an obvious expedient to give him a promiſſory note, to pay him at a future day, with intereſt for the time; and if this is an aſſignable note, ſo that the creditor may be enabled to perſuade another to advance him the principal and to ſtand in his place, it is exactly ſimilar to the debts or ſecurities of government, except that, in general, they are not payable

THE only advantage, that can reſult to a nation from public debts, is the increaſe of circulation by multiplying the caſh of the kingdom, and creating a new ſpecies of currency, aſſignable at any time and in any quantity; always therefore ready to be employed in any beneficial undertaking, by means of this it's transferable quality; and yet producing ſome profit even when it lies idle and unemployed. A certain proportion of debt ſeems therefore to be highly uſeful to a trading people; but what that proportion is, it is not for me to determine. Thus much is indiſputably certain, that the preſent magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive

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payable at any definite time. All debts, when no effects remain, both in public and private, are certain evidence of the waſte and conſumption of ſo much property, which nothing can reſtore, though frugality and induſtry may alleviate the future conſequences. When a debt is contracted, a man is not richer for paying it; if he owes one hundred pounds, and pays intereſt for it, he is in no degree richer by calling in one hundred pounds from which he receives the ſame intereſt, and therewith diſcharges the debt; but probably, if he does ſo, he will feel himſelf more comfortable and independent, and will find his credit higher, if his occaſions ſhould oblige him to borrow in future. So it is with governments; when the debt is contracted, and the money ſpent, the miſchief is done, the diſcharge of the debt can add nothing (or little comparatively) immediately to the ſtock or capital of the nation. But yet theſe important conſequences may be expected from it; viz. from the abolition of taxes upon candles, ſoap, ſalt, beer, and upon a melancholy catalogue of the neceſſary articles of life, taxes which take from thoſe who have nothing to ſpare, the price of labour would be lowered, manufactures would flouriſh with renewed vigour, the minds of the people would be cheered, and the nation would again have credit and ſpirit to meet it's moſt formidable enemies, and to repel and reſent both injury and inſult. All the nations of Europe have learnt from ſuch dear-bought experience, that poverty and miſery are the inevitable conſequences of war, as to give us reaſon to hope, that the lives and property of mankind will not, in future, be diſſipated with the profuſion and wantonneſs of former times.

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of the greateſt inconveniences. For, firſt, the enormous taxes, that are raiſed upon the neceſſaries of life for the payment of the intereſt of this debt, are a hurt both to trade and manufactures, by raiſing the price as well of the artificer's ſubſiſtence, as of the raw material, and of courſe, in a much greater proportion, the price of the commodity itſelf. Nay, the very increaſe of paper-circulation itſelf, when extended beyond what is requiſite for commerce or foreign exchange, has a natural tendency to increaſe the price of proviſions as well as of all other merchandize. For, as it's effect is to multiply the caſh of the kingdom, and this to ſuch an extent that much muſt remain unemployed, that caſh (which is the
[329] univerſal meaſure of the reſpective values of all other commodities) muſt neceſſarily ſink in it's own value[m], and every thing grow comparatively dearer. Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a conſiderable quantity of ſpecie for the intereſt; or elſe it is made an argument to grant them unreaſonable privileges, in order to induce them to reſide here. Thirdly, if the whole be owing to ſubjects only, it is then charging the active and induſtrious ſubject, who pays his ſhare of the taxes, to maintain the indolent and idle creditor who receives them. Laſtly, and principally, it weakens the internal ſtrength of a ſtate, by anticipating thoſe reſources which ſhould be reſerved to defend it in caſe of neceſſity (41). The intereſt we

[m] See page 276.

(41) The laſt is certainly a ſerious and unanſwerable objection to the increaſe of the national debt; but the three firſt objections made by the learned Judge do not ſeem to be very ſatisfactory. It is not clear that it is an evil, that things ſhould grow nominally dear in proportion to the increaſe of ſpecie, or the medium of commerce; for they will ſtill retain their relative, or compartive values with each other. Dr. Adam Smith has ably ſhewn the benefit which a country derives, from ſubſtituting any cheap article for gold and ſilver. The conſequence is, that the precious metals do not become of leſs value; or if ſo, it is but in a ſmall degree; but

now pay for our debts would be nearly ſufficient to maintain any war, that any national motives could require. And if our anceſtors in king William's time had annually paid, ſo long as their exigencies laſted, even a leſs ſum than we now annually raiſe upon their accounts, they would in the time of war have borne no greater burdens, than they have bequeathed to and ſettled upon their poſterity in time of peace; and might have been eaſed the inſtant the exigence was over.

THE reſpective produces of the ſeveral taxes before-mentioned were originally ſeparate and diſtinct funds; being ſecurities for the ſums advanced on each ſeveral tax, and for them only. But at laſt it became neceſſary, in order to avoid confuſion, as they multiplied yearly, to reduce the number of theſe ſeparate funds, by uniting and blending them toge-

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but they are carried to a foreign market, and bring back an increaſe of capital to the country. If one million pounds worth of paper, or ſhells, would anſwer as well to ſettle accounts, go to market, and would ſerve all the purpoſes of gold and ſilver, whilſt theſe preſerved their price abroad; and if the coin of this country, at preſent, amount to 30 millions, we ſhould gain what was equivalent to 29 millions by the ſubſtitution. But the paper ſecurity, created by the national debt, is little uſed in payments, or as a medium of commerce, like bills of exchange.

As to the ſecond objection, foreigners can only take away the intereſt of money which they have actually brought into the country, and which, it muſt be preſumed, our merchants are deriving as great a benefit from, and probably much greater.

With regard to the third objection, I cannot think it ſound diſcretion ever to raiſe an invidious diſtinction between thoſe who pay, and thoſe who receive the taxes, and to treat the latter with contempt. It cannot be ſuppoſed that property will ever be accumulated by idleneſs and indolence; and he ſurely deſerves the beſt of his country, who, in diſpoſing of the fruits of his induſtry, prefers the funds to any other ſecurity: for without ſuch confidence, the nation would ſoon be reduced to a ſtate of bankruptcy and ruin.

ther; ſuperadding the faith of parliament for the general ſecurity of the whole. So that there are now only three capital funds of any account, the *aggregate* fund, and the *general* fund, ſo called from ſuch union and addition; and the *ſouth ſea* fund, being the produce of the taxes appropriated to pay the intereſt of ſuch part of the national debt as was advanced by that company and it's annuitants. Whereby the ſeparate funds, which were thus united, are become mutual ſecurities for each other; and the whole produce of them, thus aggregated, liable to pay ſuch intereſt or annuities as were for-
[330] merly charged upon each diſtinct fund; the faith of the legiſlature being moreover engaged to ſupply any caſual deficiencies.

THE cuſtoms, exciſes, and other taxes, which are to ſupport theſe funds, depending on contingencies, upon exports, imports, and conſumptions, muſt neceſſarily be of a very uncertain amount; but though ſome of them have proved unproductive, and others deficient, the ſum total hath always been conſiderably more than was ſufficient to anſwer the charge upon them. The ſurpluſſes therefore of the three great national funds, the aggregate, general, and ſouth ſea funds, over and above the intereſt and annuities charged upon them, are directed by ſtatute 3 Geo. I. c. 7. to be carried together, and to attend the diſpoſition of parliament; and are uſually denominated the *ſinking* fund, becauſe originally deſtined to ſink and lower the national debt. To this have been ſince added many other entire duties, granted in ſubſequent years; and the annual intereſt of the ſums borrowed on their reſpective credits is charged on and payable out of the produce of the ſinking fund. However, the neat ſurpluſſes and ſavings, after all deductions paid, amount annually to a very conſiderable ſum. For as the intereſt on the national debt has been at ſeveral times reduced, (by the conſent of the proprietors, who had their option either to lower their intereſt or be paid their principal) the ſavings from the appropriated revenues came at length to be extremely large. This ſinking fund is the laſt

resort of the nation; it's only domestic resource on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our incumbrances. And therefore the prudent and steady application of the large sums now arising from this fund, is a point of the utmost importance, and well worthy the serious attention of parliament; which was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt: and several additional millions in several succeeding years (42).

(42) By the 26 Geo. III. c. 31. parliament had the wisdom and firmness to vest unalienably in commissioners, the sum of 1,000,000*l.* annually, for the reduction of the national debt; in which act every possible precaution was taken that could be devised, for preventing this fund from being diverted at any future time, and for carrying to the account of the commissioners for the purposes of the act, the interest of such stock as should be purchased, and such temporary annuities as should fall in.

By the 33 Geo. III. c. 22. an additional grant of 200,000*l.* was made for the same purpose, which has since been annually renewed. And upon all the money borrowed and funded during the war one *per cent.* is annually appropriated for it's reduction.

The following is the statement in the First Report from the Select Committee on Finance, printed in March 1797, p. 26.:

REDUCTION OF PUBLIC DEBT.

Your committee have further proceeded to state an account of the progress that has been made in the reduction of the public debt since the 5th of July 1786, of the sums now annually applicable thereto, and of the further progress which may be expected to be made, as far as the same can be at present ascertained, in the reduction of the debt now existing

§ 1. Your committee have great satisfaction upon this subject, in contemplating the large means which are now annually employed for the reduction of the public debt, and the considerable progress which has been already made towards that important end.

The annual sum now applicable to that purpose appears to amount to £. 3,359,799 6 2

Consisting of the following heads.

Charged upon the consolidated fund in 1786	£. 1,000,000
Annual grant	200,000
Interest of capital bought	700,026
Annuities expired or fallen in	118,371
Amount of the 1*l. per cent.* created during the war	1,341,411
	£. 3,359,799

The capital stock purchased by the application of the several sums appears to have been, on the 16th of March 1797 £. 23,334,200

§ 2. The further progress to be made in the reduction of the debt has been calculated, by order of the commissioners, according to the operation of the annual million, the interest of the stock redeemed by it, the amount of expired and unclaimed annuities, and an annual sum of two hundred thousand pounds

But, before any part of the aggregate fund (the ſurpluſſes whereof are one of the chief ingredients that form the ſinking
[331] fund) can be applied to diminiſh the principal of the public debt, it ſtands mortgaged by parliament to raiſe an annual ſum for the maintenance of the king's houſhold and the civil liſt. For this purpoſe, in the late reigns, the produce of certain branches of the exciſe and cuſtoms, the poſt-office, the duty on wine licenſes, the revenues of the remaining crown lands, the profits ariſing from courts of juſtice, (which articles include all the hereditary revenues of the crown,) and alſo a clear annuity of 120,000*l.* in money, were ſettled on the king for life, for the ſupport of his majeſty's houſhold, and the honour and dignity of the crown. And, as the amount of theſe ſeveral branches was uncertain, (though in the laſt reign they were computed to have ſometimes raiſed almoſt a million,) if they did not ariſe annually to 800,000*l.* the par-

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in aid of this fund, granted by parliament, as applied to the reduction of the debt which exiſted before the war, and conſidered as then amounting to the ſum of two hundred and forty millions.

Theſe calculations, of courſe, depend upon the different prices at which the ſeveral ſtocks in which the public debt conſiſts may happen to be purchaſed.

The earlieſt date, according to theſe calculations, at which the whole of the debt that exiſted prior to 1793, and taken at two hundred and forty millions, would be cancelled, is 33 years, from the firſt of February 1797; and even the moſt remote date at which it would be cancelled does not exceed 54 years.

§ 3. Your committee obſerve, that the ſaid calculations relate only to the progreſs which will be made, upon different data, in the reduction of the debt exiſting before the war, by the application of the funds provided for that purpoſe.

The reduction of the debt which has been incurred during the war, depends upon different conſiderations. The amount of the ſinking fund applicable thereto, including the 1*l. per cent.* on account of the loan and bills funded in the preſent ſeſſion, amounts to - - - - £. 1,341,411

The dividend on the ſtock purchaſed thereby is - 77,068

The total amount of the new ſinking fund was - £. 1,418,479

The capital of the new debt, to the reduction of which this ſum is applicable, is - - - - - £. 130,665,896

In order to give the Houſe fuller information upon this part of the ſubject, your committee have called for further calculations; but in the mean time they think it neceſſary to obſerve, that the new ſinking fund appears to bear a much larger proportion to the new debt, than the old ſinking fund, with it's accumulations, the annual grant of two hundred thouſand pounds, and the annuities expired, does at the preſent moment to the old debt: and that the old ſinking fund, after reaching the ſum of four millions, is no longer made applicable by law to the diſcharge of compound intereſt of what may then remain of the old debt; but the operation of the new ſinking fund is to continue at compound intereſt till the new debt ſhall be totally extinguiſhed.

March 31, 1797.

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liament engaged to make up the deficiency. But his preſent majeſty having, ſoon after his acceſſion, ſpontaneouſly ſignified his conſent, that his own hereditary revenues might be ſo diſpoſed of as might beſt conduce to the utility and ſatisfaction of the public; and having graciouſly accepted the limited ſum of 800,000 *l. per annum* for the ſupport of his civil liſt; the ſaid hereditary and other revenues were carried into and made a part of the aggregate fund, and the aggregate fund was charged [a] with the payment of the whole annuity to the crown of 800,000 *l.* which, being found inſufficient, was increaſed in 1777 to 900,000 *l. per annum.* Hereby the revenues themſelves, being put under the ſame care and management as the other branches of the public patrimony, produce more and are better collected than heretofore; and the public is ſtill a gainer of near 100,000 *l. per annum* by this diſintereſted conduct of his majeſty. The civil liſt, thus liquidated, together with the four millions and three quarters, intereſt of the national debt, and more than two millions produced from the ſinking fund, make up the ſeven millions and three quarters *per annum*, neat money, which were before ſtated to be the annual produce of our *perpetual* taxes; beſides the immenſe, though uncertain, ſums ariſing from the *annual* taxes on land and malt, but which, at an average, may be calculated at more [332] than two millions and a quarter; and, added to the preceding ſum, make the clear produce of the taxes (excluſive of the charge of collecting) which are raiſed yearly on the people of this country, amount to about ten millions ſterling (43).

THE expenſes defrayed by the civil liſt are thoſe that in any ſhape relate to civil government; as, the expenſes of the royal houſhold; the revenues allotted to the judges, previous to the year 1758; all ſalaries to officers of ſtate, and every of the king's ſervants; the appointments to foreign embaſſadors; the maintenance of the queen and royal family; the king's private expenſes, or privy purſe; and other very numerous outgoings, as ſecret ſervice money, penſions, and other bounties: which ſometimes have ſo far exceeded the re-

[a] Stat. 1 Geo. III. c. 1.

(43) See notes 37, 38, and 39, to this chapter.

venues appointed for that purpoſe, that application has been made to parliament to diſcharge the debts contracted on the civil liſt; as particularly in 1724, when one million[a] was granted for that purpoſe by the ſtatute 11 Geo. I. c. 17. and in 1769 and 1777, when half a million and 600,000 *l.* were appropriated to the like uſes, by the ſtatutes 9 Geo. III. c. 34. and 17 Geo III. c. 47.

THE civil liſt is indeed properly the whole of the king's revenue in his own diſtinct capacity; the reſt being rather the revenue of the public, or it's creditors, though collected and diſtributed again, in the name and by the officers of the crown: it now ſtanding in the ſame place as the hereditary income did formerly; and, as that has gradually diminiſhed, the parliamentary appointments have increaſed. The whole revenue of queen Elizabeth did not amount to more than 600,000*l.* a year[o]: that of king Charles I. was[p] 800,000*l.*(44), and the revenue voted for king Charles II. was[q] 1,200,000*l.* though complaints were made (in the firſt years at leaſt) that it did not amount to ſo much[r]. But it muſt be obſerved, that under theſe ſums were included all manner of public expenſes; among which lord Clarendon in his ſpeech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.* which was ten times
[333] more than before the former troubles[s]. The ſame revenue, ſubject to the ſame charges, was ſettled on king James II[t], but by the increaſe of trade, and more frugal management, it amounted on an average to a million and a half *per annum*, (beſides other additional cuſtoms, granted by parliament[u], which produced an annual revenue of 400,000*l.*) out of which his fleet and army were maintained at the yearly expenſe of[w] 1,100.000*l.* After the revolution, when the par-

[a] See page 327.
[o] Lord Clar. continuation. 163.
[p] Com. Journ. 4 Sept. 1660.
[q] *Ibid.*
[r] *Ibid.* 4 Jun. 1663. Lord Clar. *ibid.*
[s] Lord Clar. 165.
[t] Stat. 1 Jac. II. c. 1.
[u] *Ibid.* c. 3 & 4.
[w] Com. Journ. 1 Mar. to Mar. 1688.

(44) The revenue of the commonwealth was upwards of 1,500,000*l.* (*Sinc. Hiſt. Rev.* 2 vol. xiv.) This is a ſtriking inſtance to prove, that the burdens of the people are not neceſſarily lightened by a change in the government.

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liament took into it's own hands the anndal ſupport of the forces both maritime and military, a civil liſt revenue was ſettled on the new king and queen, amounting, with the hereditary duties, to 700,000*l. per annum*[x]; and the ſame was continued to queen Anne and king George I[y]. That of king George II, we have ſeen, was nominally augmented to[z] 800,000*l.* and in fact was conſiderably more: and that of his preſent majeſty is avowedly increaſed to the limited ſum of 900,000*l.* And upon the whole it is doubtleſs much better for the crown, and alſo for the people, to have the revenue ſettled upon the modern footing rather than the antient. For the crown; becauſe it is more certain, and collected with greater eaſe: for the people; becauſe they are now delivered from the feodal hardſhips, and other odious branches of the prerogative. And though complaints have ſometimes been made of the increaſe of the civil liſt, yet if we conſider the ſums that have been formerly granted, the limited extent under which it is now eſtabliſhed, the revenues and prerogatives given up in lieu of it by the crown, the numerous branches of the preſent royal family, and (above all) the diminution of the value of money compared with what it was worth in the laſt century, we muſt acknowlege theſe complaints to be void of any rational foundation; and that it is impoſſible to ſupport that dignity, which a king of Great Britain ſhould maintain, with an income in any degree leſs than what is now eſtabliſhed by parliament.

THIS finiſhes our inquiries into the fiſcal prerogatives of [334] the king; or his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines of this vaſt title of the law, the ſupreme executive magiſtrate, or the king's majeſty, conſidered in his ſeveral capacities and points of view. But, before we entirely diſmiſs this ſubject, it may not be improper to take a ſhort comparative review of the power of the executive magiſtrate, or prerogative of the crown, as it ſtood in former days, and as it ſtands at preſent. And we cannot but obſerve, that moſt of the laws for aſcertaining, limiting, and reſtraining this prerogative have been made within

[x] Com. Journ. 14 Mar. 1701. [z] Stat. 1 Geo. II. c. 1.
[y] *Ibid.* 17 Mar. 1701. 11 Aug 1714.

the compaſs of little more than a century paſt; from the petition of right in 3 Car. I. to the preſent time. So that the powers of the crown are now to all appearance greatly curtailed and diminiſhed ſince the reign of king James the firſt: particularly, by the abolition of the ſtar chamber and high commiſſion courts in the reign of Charles the firſt, and by the diſclaiming of martial law, and the power of levying taxes on the ſubject, by the ſame prince: by the diſuſe of foreſt laws for a century paſt: and by the many excellent proviſions enacted under Charles the ſecond; eſpecially the abolition of military tenures, purveyance, and pre-emption; the *habeas corpus* act; and the act to prevent the diſcontinuance of parliaments for above three years: and, ſince the revolution, by the ſtrong and emphatical words in which our liberties are aſſerted in the bill of rights, and act of ſettlement; by the act for triennial, ſince turned into ſeptennial, elections; by the excluſion of certain officers from the houſe of commons; by rendering the ſeats of the judges permanent, and their ſalaries liberal and independent; and by reſtraining the king's pardon from obſtructing parliamentary impeachments. Beſides all this, if we conſider how the crown is impoveriſhed and ſtripped of all it's antient revenues, ſo that it muſt greatly rely on the liberality of parliament for it's neceſſary ſupport and maintenance, we may perhaps be led to think, that the balance is inclined pretty ſtrongly to the popular ſcale, and that the executive magiſtrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our conſtitution intended.

[335] BUT, on the other hand, it is to be conſidered, that every prince, in the firſt parliament after his acceſſion, has by long uſage a truly royal addition to his hereditary revenue ſettled upon him for his life; and has never any occaſion to apply to parliament for ſupplies, but upon ſome public neceſſity of the whole realm. This reſtores to him that conſtitutional independence, which at his firſt acceſſion ſeems, it muſt be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are at leaſt ſufficiently ſtrengthened; and that an Engliſh monarch is now

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in no danger of being overborne by either the nobility or the people. The inſtruments of power are not perhaps ſo open and avowed as they formerly were, and therefore are the leſs liable to jealous and invidious reflections; but they are not the weaker upon that account. In ſhort, our national debt and taxes (beſides the inconveniencies before mentioned) have alſo in their natural conſequences thrown ſuch a weight of power into the executive ſcale of government, as we cannot think was intended by our patriot anceſtors; who glorioufly ſtruggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foreſight eſtabliſhed this ſyſtem in their ſtead. The entire collection and management of ſo vaſt a revenue, being placed in the hands of the crown, have given riſe to ſuch a multitude of new officers created by and removable at the royal pleaſure, that they have extended the influence of government to every corner of the nation. Witneſs the commiſſioners and the multitude of dependents on the cuſtoms, in every port of the kingdom; the commiſſioners of exciſe, and their numerous ſubalterns, in every inland diſtrict; the poſt-maſters, and their ſervants, planted in every town, and upon every public road; the commiſſioners of the ſtamps, and their diſtributors, which are full as ſcattered and full as numerous; the officers of the ſalt duty, which though a ſpecies of exciſe and conducted in the ſame manner, are yet made a diſtinct corps from the ordinary managers of that revenue; the ſurveyors of houſes and windows; the receivers of the land-tax; the managers of lotteries; and the commiſſioners of hackney coaches; all which are either mediately or immediately appointed by the crown, [336] and removable at pleaſure without any reaſon aſſigned: theſe, it requires but little penetration to ſee, muſt give that power, on which they depend for ſubſiſtence, an influence moſt amazingly extenſive. To this may be added the frequent opportunities of conferring particular obligations, by preference in loans, ſubſcriptions, tickets, remittances, and other money-tranſactions, which will greatly increaſe this influence; and that over thoſe perſons whoſe attachment, on account of their wealth, is frequently the moſt deſirable. All this is the natural, though perhaps the unforeſeen conſequence of erect-

ing our funds of credit, and to ſupport them eſtabliſhing our preſent perpetual taxes: the whole of which is entirely new ſince the reſtoration in 1660; and by far the greateſt part ſince the revolution in 1688. And the ſame may be ſaid with regard to the officers in our numerous army, and the places which the army has created. All which put together give the executive power ſo perſuaſive an energy with reſpect to the perſons themſelves, and ſo prevailing an intereſt with their friends and families, as will amply make amends for the loſs of external prerogative.

BUT, though this profuſion of offices ſhould have no effect on individuals, there is ſtill another newly acquired branch of power; and that is, not the influence only, but the force of a diſciplined army: paid indeed ultimately by the people, but immediately by the crown: raiſed by the crown, officered by the crown, commanded by the crown. They are kept on foot it is true only from year to year, and that by the power of parliament: but during that year they muſt, by the nature of our conſtitution, if raiſed at all, be at the abſolute diſpoſal of the crown. And there need but few words to demonſtrate how great a truſt is thereby repoſed in the prince by his people. A truſt, that is more than equivalent to a thouſand little troubleſome prerogatives.

ADD to all this, that beſides the civil liſt, the immenſe revenue of almoſt ſeven millions ſterling, which is annually paid to the creditors of the public, or carried to the ſinking
[337] fund, is firſt depoſited in the royal exchequer, and thence iſſued out to the reſpective offices of payment. This revenue the people can never refuſe to raiſe, becauſe it is made perpetual by act of parliament: which alſo, when well conſidered, will appear to be a truſt of great delicacy and high importance.

UPON the whole therefore I think it is clear, that, whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any tranſactions in the laſt century. Much is indeed given up; but much is alſo acquired. The ſtern commands of prerogative have yielded to the milder voice of influence: the ſlaviſh and exploded doctrine of non-reſiſtance has given way to a military eſtabliſhment

bliſhment by law; and to the diſuſe of parliaments has ſucceeded a parliamentary truſt of an immenſe perpetual revenue. When, indeed, by the free operation of the ſinking fund, our national debts ſhall be leſſened; when the poſture of foreign affairs, and the univerſal introduction of a well planned and national militia, will ſuffer our formidable army to be thinned and regulated; and when (in conſequence of all) our taxes ſhall be gradually reduced; this adventitious power of the crown will ſlowly and imperceptibly diminiſh, as it ſlowly and imperceptibly roſe. But, till that ſhall happen, it will be our eſpecial duty, as good ſubjects and good Engliſhmen, to reverence the crown, and yet guard againſt corrupt and ſervile influence from thoſe who are intruſted with it's authority; to be loyal, yet free; obedient, and yet independent; and, above every thing, to hope that we may long, very long, continue to be governed by a ſovereign, who, in all thoſe public acts that have perſonally proceeded from himſelf, hath manifeſted the higheſt veneration for the free conſtitution of Britain; hath already in more than one inſtance remarkably ſtrengthened it's outworks; and will therefore never harbour a thought, or adopt a perſuaſion, in any the remoteſt degree detrimental to public liberty.

CHAPTER THE NINTH. [338]

OF SUBORDINATE MAGISTRATES.

IN a former chapter of theſe commentaries[a] we diſtinguiſhed magiſtrates into two kinds; ſupreme, or thoſe in whom the ſovereign power of the ſtate reſides; and ſubordinate, or thoſe who act in an inferior ſecondary ſphere. We have hitherto conſidered the former kind only; namely, the ſupreme legiſlative power or parliament, and the ſupreme executive power, which is the king: and are now to pro-

[a] ch. 2. page 146.

ceed

ceed to inquire into the rights and duties of the principal ſubordinate magiſtrates.

AND herein we are not to inveſtigate the powers and duties of his majeſty's great officers of ſtate, the lord treaſurer, lord chamberlain, the principal ſecretaries, or the like; becauſe I do not know that they are in that capacity in any conſiderable degree the objects of our laws, or have any very important ſhare of magiſtracy conferred upon them: except that the ſecretaries of ſtate are allowed the power of commitment, in order to bring offenders to trial[b]. Neither ſhall I here treat of the office and authority of the lord chancellor, or the other judges of the ſuperior courts of juſtice; becauſe they will find a more proper place in the third part of theſe commentaries. Nor ſhall I enter into any minute diſquiſitions, with regard to the rights and dignities of mayors and aldermen, or other magiſtrates of particular corporations; becauſe
[339] theſe are mere private and ſtrictly municipal rights, depending entirely upon the domeſtic conſtitution of their reſpective franchiſes. But the magiſtrates and officers, whoſe rights and duties it will be proper in this chapter to conſider, are ſuch as are generally in uſe, and have a juriſdiction and authority diſperſedly throughout the kingdom: which are, principally, ſheriffs; coroners; juſtices of the peace; conſtables; ſurveyors of highways; and overſeers of the poor. In treating of all which I ſhall inquire into, firſt, their antiquity and original; next, the manner in which they are appointed and may be removed; and laſtly, their rights and duties. And firſt of ſheriffs,

I. THE ſheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, ꝑcype ꝥenepa, the reeve, bailiff, or officer of the ſhire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the cuſtody of the ſhire is ſaid to have been committed at the firſt diviſion of this kingdom into counties. But the earls in proceſs of time, by reaſon of their high employments and attendance on the king's perſon,

[b] 1 Leon. 70. 2 Leon. 175. Comb. 143. 5 Mod. 84. Salk. 347. Carth. 291.

not being able to tranſact the buſineſs of the county, were delivered of that burden[c]; reſerving to themſelves the honour, but the labour was laid on the ſheriff. So that now the ſheriff does all the king's buſineſs in the county; and though he be ſtill called *vice-comes*, yet he is entirely independent of, and not ſubject to the earl; the king by his letters patent committing *cuſtodiam comitatus* to the ſheriff, and him alone.

SHERIFFS were formerly choſen by the inhabitants of the ſeveral counties. In confirmation of which it was ordained by ſtatute 28 Edw. I. c. 8. that the people ſhould have election of ſheriffs in every ſhire, when the ſhrievalty is not of inheritance. For antiently in ſome counties the ſheriffs were hereditary; as I apprehend they were in Scotland till the ſtatute 20 Geo. II. c. 43; and ſtill continue in the county of Weſtmorland to this day (1): the city of London having alſo [340] the inheritance of the ſhrievalty of Middleſex veſted in their body by charter[d] (2). The reaſon of theſe popular elections is aſſigned in the ſame ſtatute, c. 13. "that the commons "might chuſe ſuch as would not be a burden to them." And herein appears plainly a ſtrong trace of the democratical part of our conſtitution; in which form of government

[c] Dalton of ſheriffs. c. 1. [d] 3 Rep. 72.

(1) The earl of Thanet is hereditary ſheriff of Weſtmorland. This office may deſcend to, and be executed by, a female; for "Ann counteſs of Pembroke had the office of hereditary ſheriff "of Weſtmorland, and exerciſed it in perſon. At the aſſizes at "Appleby ſhe ſat with the judges on the bench." *Harg. Co. Litt.* 326.

(2) The election of the ſheriffs of London and Middleſex was granted to the citizens of London for ever in very ancient times, upon condition of their paying 300 *l.* a year to the king's exchequer. In conſequence of this grant, they have always elected two ſheriffs, though theſe conſtitute together but one officer; and if one die, the other cannot act till another is elected. (4 *Bac. Abr.* 447.) In the year 1748, the corporation of London made a bye-law, impoſing a fine of 600 *l.* upon every perſon, who being elected, ſhould refuſe to ſerve the office of ſheriff. See the caſe of Evans, eſq. and the chamberlain of London, 2 *Burn. E. L.* 185.

it

it is an indiſpenſable requiſite, that the people ſhould chuſe their own magiſtrates [e]. This election was in all probability not abſolutely veſted in the commons, but required the royal approbation. For, in the Gothic conſtitution, the judges of the county courts (which office is executed by our ſheriff) were elected by the people, but confirmed by the king: and the form of their election was thus managed: the people, or *incolae territorii* choſe *twelve* electors, and they nominated *three* perſons, *ex quibus rex unum confirmabat* [f]. But with us in England theſe popular elections, growing tumultuous, were put an end to by the ſtatute 9 Edw. II. ſt. 2. which enacted, that the ſheriffs ſhould from thenceforth be aſſigned by the chancellor, treaſurer, and the judges; as being perſons in whom the ſame truſt might with confidence be repoſed. By ſtatutes 14 Edw. III. c. 7. 23 Hen. VI. c. 8. and 21 Hen. VIII. c. 20. (3) the chancellor, treaſurer, preſident of the king's council, *chief* juſtices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new ſheriffs, uſed commonly to bear date the ſixth day of November [g]. The ſtatute of Cambridge, 12 Ric. II. c. 2. ordains, that the chancellor, treaſurer, keeper of the privy ſeal, ſteward of the king's houſe, the king's chamberlain, clerk of the rolls, the juſtices of the one bench and the other, barons of the exchequer, and all other that ſhall be called to ordain, name, or make juſtices of the peace, *ſheriffs*, and other officers of the king, ſhall be ſworn to act indifferently, and to appoint no man that ſueth either privily or openly to be put in office, but ſuch only as they ſhall judge to be the beſt and moſt ſufficient. And the cuſtom
[341] now is (and has been at leaſt ever ſince the time of Forteſcue [h], who was chief juſtice and chancellor to Henry the ſixth) that all the judges, together with the other great officers and privy counſellors, meet in the exchequer on the

[e] Monteſq. Sp. L. b. 2. c. 2. [g] Stat. 12 Edw. IV. c. 1.
[f] Stiern. *de jure Goth. l.* 1. *c.* 3. [h] *de L. L.* c. 24.

(3) This laſt ſtatute, as is obſerved by Mr. Wooddeſon, 1 vol. 89. ſeems quite to a different purpoſe.

morrow

morrow of All Souls yearly; (which day is now altered to the morrow of St. Martin by the laſt act for abbreviating Michaelmas term,) and then and there the judges propoſe three perſons, to be reported (if approved of) to the king, who afterwards appoints one of them to be ſheriff (4).

THIS cuſtom, of the *twelve* judges propoſing *three* perſons, ſeems borrowed from the Gothic conſtitution before-mentioned; with this difference, that among the Goths the twelve nominors were firſt elected by the people themſelves. And this uſage of ours at it's firſt introduction, I am apt to believe, was founded upon ſome ſtatute, though not now to be found among our printed laws: firſt, becauſe it is materially different from the direction of all the ſtatutes before mentioned:

(4) The following is the preſent mode of nominating ſheriffs in the exchequer on the morrow of St. Martin:

The chancellor, chancellor of the exchequer, the judges, and ſeveral of the privy council aſſemble, and an officer of the court adminiſters an oath to them in old French, that they will nominate no one from favour, partiality, or any improper motive: this done, the ſame officer having the liſt of the counties in alphabetical order, and of thoſe who were nominated the year preceding, reads over the three names, and the laſt of the three he pronounces to be the preſent ſheriff; but where there has been a pocket-ſheriff, he reads the three names upon the liſt, and then declares who is the preſent ſheriff. If any of the miniſtry or judges has an objection to any perſon named in the liſt, he then mentions it, and another gentleman is nominated in his room; if no objection is made, ſome one riſes and ſays, "to the two gentlemen I know no objection, "and I recommend A. B. eſq. in the room of the preſent ſheriff."

Another officer has a paper with a number of names given him by the clerk of aſſize for each county, which paper generally contains the names of the gentlemen upon the former liſt, and alſo of gentlemen who are likely to be nominated, and whilſt the three are nominated, he prefixes 1, 2, or 3, to their names, according to the order in which they are placed; which, for greater certainty, he afterwards reads over twice. Several objections are made to gentlemen; ſome, perhaps, at their own requeſt; ſuch as, that they are abroad, that their eſtates are ſmall and incumbered, that they have no equipage, that they are practiſing barriſters, or officers in the militia, &c.

The new ſheriff is generally appointed about the end of the following Hilary term; this extenſion of the time was, probably, in conſequence of the 17 Edw. IV. c. 7. which enables the old ſheriff to hold his office over Michaelmas and Hilary terms.

which

which it is hard to conceive that the judges would have countenanced by their concurrence, or that Forteſcue would have inſerted in his book, unleſs by the authority of ſome ſtatute: and alſo becauſe a ſtatute is expreſsly referred to in the record, which ſir Edward Coke tells us he tranſcribed from the council-book of 3 March, 34 Hen. VI. and which is in ſubſtance as follows (5). The king had of his own authority appointed a man ſheriff of Lincolnſhire, which office he refuſed to take upon him: whereupon the opinions of the judges were taken, what ſhould be done in this behalf. And the two chief juſtices, ſir John Forteſcue and ſir John Priſot, delivered the unanimous opinion of them all; "that the "king did an error when he made a perſon ſheriff, that was "not choſen and preſented to him according to the *ſtatute*; "that the perſon refuſing was liable to no fine for diſobedi- "ence, as if he had been one of the *three* perſons choſen ac- "cording to the tenor of the *ſtatute*; that they would adviſe "the king to have recourſe to the *three* perſons that were "choſen according to the *ſtatute*, or that ſome other thrifty

j 2 Inſt. 559.

(5) I am inclined to diſagree with the learned Judge's conjecture, that the preſent practice originated from a ſtatute which cannot now be found; becauſe if ſuch a ſtatute ever exiſted, it muſt have been paſſed between the date of this record, the 34 Hen. VI. and the ſtatute 23 Hen. VI. c. 8. referred to by the learned Commentator in the preceding page; for that ſtatute recites and ratifies the 14 Edw. III. c. 7. which provides only for the nomination of one perſon to fill the office when vacant; yet the former ſtatute 9 Edw. II. ſt. 2. leaves the number indefinite, *viz.* ſheriffs ſhall be aſſigned by the chancellor, &c. and if ſuch a ſtatute had paſſed in the courſe of thoſe eleven years, it is probable that it would have been referred to by ſubſequent ſtatutes. I ſhould conceive that the practice originated from the conſideration that, as the king was to confirm the nomination by his patent, it was more convenient and reſpectful to preſent three to him than only one; and though this proceeding did not exactly correſpond with the directions of the ſtatute, yet it was not contrary to it's ſpirit, or in ſtrictneſs to it's letter; and therefore the judges might, perhaps, think themſelves warranted in ſaying, that the three perſons were choſen according to the tenor of the ſtatute.

"man

"man be intreated to occupy the office for this year; and "that, the next year, to eſchew ſuch inconveniences, the "order of the *ſtatute* in this behalf made be obſerved." But notwithſtanding this unanimous reſolution of all the judges [342] of England, thus entered in the council book, and the ſtatute 34 & 35 Hen. VIII. c. 26. § 61. which expreſsly recognizes this to be the law of the land, ſome of our writers [i] have affirmed, that the king, by his prerogative, may name whom he pleaſes to be ſheriff, whether choſen by the judges or no. This is grounded on a very particular caſe in the fifth year of queen Elizabeth, when, by reaſon of the plague, there was no Michaelmas term kept at Weſtminſter: ſo that the judges could not meet there *in craſtino animarum* to nominate the ſheriffs: whereupon the queen named them herſelf, without ſuch previous aſſembly, appointing for the moſt part one of the two remaining in the laſt year's liſt [k]. And this caſe, thus circumſtanced, is the only authority in our books for the making theſe extraordinary ſheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a ſheriff without the election of the judges, *non obſtante aliquo ſtatuto in contrarium*: but the doctrine of *non obſtante*'s, which ſets the prerogative above the laws, was effectually demoliſhed by the bill of rights at the revolution, and abdicated Weſtminſter-hall when king James abdicated the kingdom. However, it muſt be acknowleged, that the practice of occaſionally naming what are called pocket-ſheriffs, by the ſole authority of the crown, hath uniformly continued to the reign of his preſent majeſty; in which, I believe, few (if any) compulſory inſtances have occurred (6).

[i] Jenkins. 229. [k] Dyer, 225.

(6) When the king appoints a perſon ſheriff, who is not one of the three nominated in the exchequer, he is called a pocket-ſheriff. It is probable, that no compulſory inſtance of the appointment of a pocket-ſheriff ever occurred; and the unanimous opinion of the judges, preſerved in the record cited by the learned Commentator from 2 Inſt. 559. precludes the poſſibility of ſuch a caſe. This is an ungracious prerogative; and whenever it is exerciſed, unleſs the occaſion is manifeſt, the whole adminiſtration of juſtice throughout one county for a twelvemonth, if not corrupted, is certainly

SHERIFFS, by virtue of ſeveral old ſtatutes, are to continue in their office no longer than one year: and yet it hath been ſaid [l] that a ſheriff may be appointed *durante bene placito*, or during the king's pleaſure; and ſo is the form of the royal writ [m]. Therefore, till a new ſheriff be named, his office cannot be determined, unleſs by his own death, or the demiſe of the king; in which laſt caſe it was uſual for the ſucceſſor to ſend a new writ to the old ſheriff [n]: but now by ſtatute 1 Ann. ſt. 1. c. 8. all officers appointed by the pre-
[343] ceding king may hold their offices, for ſix months after the king's demiſe, unleſs ſooner diſplaced by the ſucceſſor. We may farther obſerve, that by ſtatute 1 Ric. II. c. 11. no man that has ſerved the office of ſheriff for one year, can be compelled to ſerve the ſame again within three years after (7).

WE ſhall find it is of the utmoſt importance to have the ſheriff appointed according to law, when we conſider his power and duty. Theſe are either as a judge, as the keeper of the king's peace, as a miniſterial officer of the ſuperior courts of juſtice, or as the king's bailiff.

IN his judicial capacity he is to hear and determine all cauſes of forty ſhillings value and under, in his county court, of which more in it's proper place; and he has alſo a judicial power in divers other civil caſes [o]. He is likewiſe to decide the elections of knights of the ſhire, (ſubject to the control of the houſe of commons,) of coroners, and of verderors; to judge of the qualification of voters, and to return ſuch as he ſhall determine to be duly elected.

AS the keeper of the king's peace, both by common law and ſpecial commiſſion, he is the firſt man in the county, and ſuperior in rank to any nobleman therein, during his office [p].

[l] 4 Rep. 32.
[m] Dalt. of ſheriffs. 8.
[n] Dalt. 7.
[o] *Ibid.* c. 4.
[p] 1 Roll. Rep. 237.

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certainly ſuſpected. The cauſe ought to be urgent or inevitable, when recourſe is had to this prerogative.

(7) If there be other ſufficient within the county. Until a different regulation was made by 8 Eliz. c. 16. in a great many inſtances two counties had one and the ſame ſheriff: this is ſtill the caſe in the counties of Cambridge and Huntingdon.

He

He may apprehend, and commit to priſon, all perſons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to purſue, and take all traitors, murderers, felons, and other miſdoers, and commit them to gaol for ſafe cuſtody. He is alſo to defend his county againſt any of the king's enemies when they come into the land: and for this purpoſe, as well as for keeping the peace and purſuing felons, he may command all the people of his county to attend him; which is called the *poſſe comitatus*, or power of the county [q]: and this ſummons every perſon above fifteen years old, and under the degree of a peer, is bound to attend upon warning[r], under pain of fine and impriſonment [s]. But though [344] the ſheriff is thus the principal conſervator of the peace in his county, yet by the expreſs directions of the great charter [t], he, together with the conſtable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of juſtice ſhould be alſo the judges; ſhould impoſe, as well as levy, fines and amercements; ſhould one day condemn a man to death, and perſonally execute him the next. Neither may he act as an ordinary juſtice of the peace during the time of his office [u]: for this would be equally inconſiſtent; he being in many reſpects the ſervant of the juſtices.

IN his miniſterial capacity the ſheriff is bound to execute all proceſs iſſuing from the king's courts of juſtice. In the commencement of civil cauſes, he is to ſerve the writ, to arreſt, and to take bail; when the cauſe comes to trial, he muſt ſummon and return the jury; when it is determined, he muſt ſee the judgment of the court carried into execution. In criminal matters, he alſo arreſts and impriſons, he returns the jury, he has the cuſtody of the delinquent, and he

[q] Dalt. c. 95.
[r] Lamb. Eiren. 315.
[s] Stat. 2 Hen. V. c. 8.
[t] *cap.* 17.
[u] Stat. 1 Mar. ſt. 2. c. 8.

executes the ſentence of the court, though it extend to death itſelf.

As the king's bailiff, it is his buſineſs to preſerve the rights of the king within his bailiwick; for ſo his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whoſe territory is divided into bailiwicks, as that of England into counties[w]. He muſt ſeiſe to the king's uſe all lands devolved to the crown by attainder or eſcheat; muſt levy all fines and forfeitures; muſt ſeiſe and keep all waifs, wrecks, eſtrays, and the like, unleſs they be granted to ſome ſubject; and muſt alſo collect the king's rents within the bailiwick, if commanded by proceſs from the exchequer[x].

[345] To execute theſe various offices, the ſheriff has under him many inferior officers; an under-ſheriff, bailiffs, and gaolers; who muſt neither buy, ſell, nor farm their offices, on forfeiture of 500 *l*[y].

THE under-ſheriff uſually performs all the duties of the office; a very few only excepted, where the perſonal preſence of the high-ſheriff is neceſſary. But no under-ſheriff ſhall abide in his office above one year[z]; and if he does, by ſtatute 23 Hen. VI. c. 8. he forfeits 200 *l*. a very large penalty in thoſe early days. And no under-ſheriff or ſheriff's officer ſhall practiſe as an attorney, during the time he continues in ſuch office[a]: for this would be a great inlet to partiality and oppreſſion. But theſe ſalutary regulations are ſhamefully evaded, by practiſing in the names of other attorneys, and putting in ſham deputies by way of nominal under-ſheriffs: by reaſon of which, ſays Dalton[b], the under-ſheriffs and bailiffs do grow ſo cunning in their ſeveral places, that they are able to deceive, and it may well be feared that

[w] Forteſc. de L. L. c. 24.
[x] Dalt. c. 9.
[y] Stat. 3 Geo. I. c. 15.
[z] Stat. 42 Edw. III. c. 9.
[a] Stat. 1 Hen. V. c. 4.
[b] of ſheriffs, c. 115.

many

many of them do deceive, both the king, the high-ſheriff, and the county.

BAILIFFS, or ſheriff's officers, are either bailiffs of hundreds, or ſpecial bailiffs. Bailiffs of hundreds are officers appointed over thoſe reſpective diſtricts by the ſheriffs, to collect fines therein; to ſummon juries; to attend the judges and juſtices at the aſſiſes, and quarter ſeſſions; and alſo to execute writs and proceſs in the ſeveral hundreds. But, as theſe are generally plain men, and not thoroughly ſkilful in this latter part of their office, that of ſerving writs, and making arreſts and executions, it is now uſual to join ſpecial bailiffs with them; who are generally mean perſons, employed by the ſheriffs on account only of their adroitneſs and dexterity in hunting and ſeiſing their prey. The ſheriff being anſwerable for the miſdemeſnors of theſe bailiffs, [346] they are therefore uſually bound in an obligation with ſureties for the due execution of their office, and thence are called bound-bailiffs; which the common people have corrupted into a much more homely appellation.

GAOLERS are alſo the ſervants of the ſheriff, and he muſt be reſponſible for their conduct. Their buſineſs is to keep ſafely all ſuch perſons as are committed to them by lawful warrant: and, if they ſuffer any ſuch to eſcape, the ſheriff ſhall anſwer it to the king, if it be a criminal matter; or, in a civil caſe, to the party injured [c]. And to this end the ſheriff muſt [d] have lands ſufficient within the county to anſwer the king and his people (8). The abuſes of gaolers and

[c] Dalt. c. 118. 4 Rep. 34.
[d] Stat. 9 Edw. II. ſt. 2. 2 Edw. III. c. 4. 4 Edw. III. c. 9. 5 Edw. III. c. 4. 13 & 14 Car. II. c. 21. § 7.

(8) This is the only qualification required from a ſheriff. That it was the intention of our anceſtors that the lands of a ſheriff ſhould be conſiderable, abundantly appears from their having this proviſion ſo frequently repeated, and at the ſame time that they obtained a confirmation of *magna charta* and their moſt valuable liberties. As the ſheriff, both in criminal and civil caſes, may have

ſheriff's officers, towards the unfortunate perſons in their cuſtody, are well reſtrained and guarded againſt by ſtatute 32 Geo. II. c. 28. and by ſtatute 14 Geo. III. c. 59. proviſions are made for better preſerving the health of priſoners, and preventing the gaol diſtemper (9).

THE vaſt expence, which cuſtom had introduced in ſerving the office of high-ſheriff, was grown ſuch a burthen to the ſubject, that it was enacted, by ſtatute 13 and 14 Car. II. c. 21. that no ſheriff (except of London, Weſtmorland, and towns which are counties of themſelves) ſhould keep any table at the aſſiſes, except for his own family, or give any preſents to the judges or their ſervants, or have more than forty men in livery; yet, for the ſake of ſafety and decency, he may not have leſs than twenty men in England and twelve in Wales; upon forfeiture, in any of theſe caſes, of 200 *l.*

II. THE coroner's is alſo a very antient office at the common law. He is called coroner, *coronator*, becauſe he hath principally to do with pleas of the crown, or ſuch wherein the king is more immediately concerned [e]. And in this light

[e] 2 Inſt. 31. 4 Inſt. 271.

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the cuſtody of men of the greateſt property in the country, his own eſtate ought certainly to be large, that he may be above all temptation to permit them to eſcape, or to join them in their flight. In ancient times this office was frequently executed by the nobility and perſons of the higheſt rank in the kingdom. *Eligebantur olim ad hoc officium potentiſſimi ſepenumero totius regni proceres, barones, comites, duces, interdum et regum filii.* Spel. Gloſſ. *Vicecom.* Biſhops alſo were not unfrequently ſheriffs. Richard duke of Glouceſter (afterwards Richard the third) was ſheriff of Cumberland five years together. (*Burn. Hiſt. Cumb.* 570.) It does not appear that there is any expreſs law to exclude the nobility from the execution of this office, though it has been long appropriated to commoners.

(9) By ſtatute 24 Geo. III. ſeſſ. 2. c. 54. ſect. 22. no gaoler is to ſuffer tippling or gaming in the priſon, or to ſell any liquors therein, under the penalty of 10 *l.* to be recovered by diſtreſs upon conviction.

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the lord chief juſtice of the king's bench is the principal coroner in the kingdom, and may (if he pleaſes) exerciſe the juriſdiction of a coroner in any part of the realm [f]. But there are alſo particular coroners for every county of England; uſually four, but ſometimes ſix, and ſometimes [347] fewer [g]. This office [h] is of equal antiquity with the ſheriff; and was ordained together with him to keep the peace, when the earls gave up the wardſhip of the county.

HE is ſtill choſen by all the freeholders in the county court; as by the policy of our antient laws the ſheriffs, and conſervators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people [i]; and as verderors of the foreſt ſtill are, whoſe buſineſs it is to ſtand between the prerogative and the ſubject in the execution of the foreſt laws. For this purpoſe there is a writ at common law *de coronatore eligendo* [k]: in which it is expreſsly commanded the ſheriff, "*quod talem eligi faciat, qui melius* "*et ſciat, et velit, et poſſit, officio illi intendere.*" And, in order to effect this the more ſurely, it was enacted by the ſtatute [l] of Weſtm. 1. that none but lawful and diſcreet knights ſhould be choſen; and there was an inſtance in the 5 Edw. III. of a man being removed from this office, becauſe he was only a merchant [m] (10). But it ſeems it is now ſufficient if a

[f] 4 Rep. 57.
[g] F. N. B. 163.
[h] Mirror. c. 1. § 3.
[i] 2 Inſt. 558.
[k] F. N. B. 163.
[l] 3 Edw. I. c. 10.
[m] 2 Inſt. 32.

(10) That this was an office of high dignity in ancient times, appears from Chaucer's deſcription of the Frankelein:

At ſeſſions ther was he lord and ſire,
Ful often time he was knight of the ſhire,
A ſhereve hadde he ben, and a coronour,
Was no wher ſwiche a worthy vavaſour.

Selden, tit. hon. 2. c. 5. ſ. 4. obſerves, that ſome copies have it *coronour*; others *countour*. But the office of an accountant is perfectly inconſiſtent with the character deſcribed, unleſs a countour ſignified an eſcheator.

man hath lands enough to be made a knight (11), whether he be really knighted or not [n]: for the coroner ought to have an eſtate ſufficient to maintain the dignity of his office, and anſwer any fines that may be ſet upon him for his miſbehaviour [o]; and if he hath not enough to anſwer, his fine ſhall be levied on the county, as the puniſhment for electing an inſufficient officer [p]. Now, indeed, through the culpable neglect of gentlemen of property, this office has been ſuffered to fall into diſrepute, and get into low and indigent hands: ſo that, although formerly no coroners would condeſcend to be paid for ſerving their country, and they were by the
[348] aforeſaid ſtatute of Weſtm. 1. expreſsly forbidden to take a reward, under pain of a great forfeiture to the king; yet for many years paſt they have only deſired to be choſen for the ſake of their perquiſites: being allowed fees for their attendance by the ſtatute 3 Hen. VII. c. 1. which ſir Edward Coke complains of heavily [q]; though ſince his time thoſe fees have been much enlarged [r].

THE coroner is choſen for life: but may be removed, either by being made ſheriff, or choſen verderor, which are offices incompatible with the other; or by the king's writ *de coronatore exonerando*, for a cauſe to be therein aſſigned, as that he is engaged in other buſineſs, is incapacitated by years or ſickneſs, hath not a ſufficient eſtate in the county, or lives in an inconvenient part of it [s]. And by the ſtatute 25 Geo. II. c. 29. extortion, neglect, or miſbehaviour, are alſo made cauſes of removal.

THE office and power of a coroner are alſo, like thoſe of the ſheriff, either judicial or miniſterial; but principally judicial. This is in great meaſure aſcertained by ſtatute 4 Edw. I.

[n] F. N. B. 163, 164.
[o] *Ibid.*
[p] Mirr. c. 1. § 3. 2 Inſt. 175.
[q] 2 Inſt. 210.
[r] Stat. 25 Geo. II. c. 29.
[s] F. N. B. 163, 164.

(11) Which by the *ſtatutum de militibus*, 1 Edw. II. were lands to the amount of 20 *l. per annum*.

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de officio coronatoris; and conſiſts, firſt, in inquiring, when any perſon is ſlain, or dies ſuddenly, or in priſon, concerning the manner of his death. And this muſt be "*ſuper viſum* "*corporis*[r];" for, if the body be not found, the coroner cannot ſit[s]. He muſt alſo ſit at the very place where the death happened; and his inquiry is made by a jury from four, five, or ſix of the neighbouring towns, over whom he is to preſide. If any be found guilty by this inqueſt of murder or other homicide, he is to commit them to priſon for farther trial, and is alſo to inquire concerning their lands, goods and chattels, which are forfeited thereby: but, whether it be homicide or not, he muſt inquire whether any deodand has accrued to the king, or the lord of the franchiſe, by this death: and muſt certify the whole of this inquiſition (under his own ſeal and [349]
the ſeals of the jurors[u]) together with the evidence thereon, to the court of king's bench, or the next aſſiſes. Another branch of his office is to inquire concerning ſhipwrecks; and certify whether wreck or not, and who is in poſſeſſion of the goods. Concerning treaſure-trove, he is alſo to inquire who were the finders, and where it is, and whether any one be ſuſpected of having found and concealed a treaſure; "and that may be well perceived, (ſaith the old ſtatute of "Edw. I.) where one liveth riotouſly, haunting taverns, "and hath done ſo of long time:" whereupon he might be attached, and held to bail, upon this ſuſpicion only.

THE miniſterial office of the coroner is only as the ſheriff's ſubſtitute. For when juſt exception can be taken to the ſheriff, for ſuſpicion of partiality, (as that he is intereſted in the ſuit, or of kindred to either plaintiff or defendant,) the proceſs muſt then be awarded to the coroner, inſtead of the ſheriff, for execution of the king's writs[v]."

[r] 4 Inſt. 271.

[s] Thus, in the Gothic conſtitution, before any fine was payable by the neighbourhood, for the ſlaughter of a man therein, "*de corpore delicti conſtare* "*oportebat*; *i. e. non tam fuiſſe aliquem* "*in territorio iſto mortuum inventum,* "*quam vulneratum et caeſum. Poteſt enim* "*homo etiam ex alia cauſa ſubito mori.*" Stiernhook *de jure Gothor. l.* 3. *c.* 4.

[u] Stat. 33 Hen. VIII. c. 12. 1 & 2 P. & M. c. 13. 2 Weſt. Symbol. § 310. Crompt. 264. Tremain. P. C. 621.

[v] 4 Inſt. 271.

III. THE next ſpecies of ſubordinate magiſtrates, whom I am to conſider, are juſtices of the peace; the principal of whom is the *cuſtos rotulorum*, or keeper of the records of the county. The common law hath ever had a ſpecial care and regard for the conſervation of the peace; for peace is the very end and foundation of civil ſociety. And therefore, before the preſent conſtitution of juſtices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of theſe ſome had, and ſtill have, this power annexed to other offices which they hold; others had it merely by itſelf, and were thence named *cuſtodes* or *conſervatores pacis*. Thoſe that were ſo *virtute officii* ſtill continue: but the latter ſort are ſuperſeded by the modern juſtices.

THE king's majeſty [w] is, by his office and dignity royal, the principal conſervator of the peace within all his domi-
[350] nions; and may give authority to any other to ſee the peace kept, and to puniſh ſuch as break it: hence it is uſually called the king's peace. The lord chancellor or keeper, the lord treaſurer, the lord high ſteward of England, the lord mareſchal, the lord high conſtable of England, (when any ſuch officers are in being,) and all the juſtices of the court of king's bench, (by virtue of their offices,) and the maſter of the rolls, (by preſcription,) are general conſervators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it [x]: the other judges are only ſo in their own courts. The coroner is alſo a conſervator of the peace within his own county [y]; as is alſo the ſheriff [z]; and both of them may take a recognizance or ſecurity for the peace. Conſtables, tythingmen, and the like, are alſo conſervators of the peace within their own juriſdictions; and may apprehend all breakers of the peace and commit them, till they find ſureties for their keeping it [a].

[w] Lambard. Eirenarch. 12.
[x] Lamb. 12.
[y] Britton. 3.
[z] F. N. B. 81.
[a] Lamb. 14.

THOSE that were, without any office, ſimply and merely conſervators of the peace, either claimed that power by preſcription[b]; or were bound to exerciſe it by the tenure of their lands[c]; or, laſtly, were choſen by the freeholders in full county court before the ſheriff; the writ for their election directing them to be choſen "*de probioribus et potentioribus comitatus ſui in cuſtodes pacis*[d]." But when queen Iſabel, the wife of Edward II, had contrived to depoſe her huſband by a forced reſignation of the crown, and had ſet up his ſon Edward III in his place; this, being a thing then without example in England, it was feared would much alarm the people: eſpecially as the old king was living, though hurried about from caſtle to caſtle; till at laſt he met with an untimely death. To prevent therefore any riſings, or other diſturbance of the peace, the new king ſent writs to all the ſheriffs in England, the form of which is preſerved by [351] Thomas Walſingham[e], giving a plauſible account of the manner of his obtaining the crown; to wit, that it was done *ipſius patris beneplacito*: and withal commanding each ſheriff that the peace be kept throughout his bailiwick, on pain and peril of diſinheritance and loſs of life and limb. And in a few weeks after the date of theſe writs, it was ordained in parliament[f], that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the country, ſhould be *aſſigned* to keep the peace. And in this manner, and upon this occaſion, was the election of the conſervators of the peace taken from the people, and given to the king[g]; this aſſignment being conſtrued to be by the king's permiſſion[h]. But ſtill they were only called conſervators, wardens, or keepers of the peace, till the ſtatute 34 Edward III. c. 1. gave them the power of trying felonies; and then they acquired the more honourable appellation of juſtices[i].

[b] Lamb. 15.
[c] *Ibid.* 17.
[d] *Ibid.* 16.
[e] Hiſt. *A. D.* 1327.
[f] Stat. 1 Edw. III. c. 16.
[g] Lamb. 20.
[h] Stat. 4 Edw. III. c. 2. 18 Edw. III ſt. 2. c. 2.
[i] Lamb. 23.

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THESE juſtices are appointed by the king's ſpecial commiſſion under the great ſeal, the form of which was ſettled by all the judges, *A. D.* 1590[i]. This appoints them all[k], jointly and ſeverally, to keep the peace, and any two or more of them to inquire of and determine felonies and other miſdemeſnors: in which number ſome particular juſtices, or one of them, are directed to be always included, and no buſineſs to be done without their preſence; the words of the commiſſion running thus, "*quorum aliquem veſtrum, A. B. C. D. &c. unum eſſe volumus;*" whence the perſons ſo named are uſually called juſtices of the *quorum*. And formerly it was cuſtomary to appoint only a ſelect number of juſtices, eminent for their ſkill and diſcretion, to be of the *quorum*; but now the practice is to advance almoſt all of them to that dignity, naming them all over again in the *quorum* clauſe, except perhaps only ſome one inconſiderable perſon for the ſake of
[352] propriety: and no exception is now allowable, for not expreſſing in the form of warrants, *&c.* that the juſtice who iſſued them is of the *quorum*[l]. When any juſtice intends to act under this commiſſion, he ſues out a writ of *dedimus poteſtatem*, from the clerk of the crown in chancery, empowering certain perſons therein named to adminiſter the uſual oaths to him; which done, he is at liberty to act.

TOUCHING the number and qualifications of theſe juſtices; it was ordained by ſtatute 18 Edw. III. c. 2. that *two* or *three*, of the beſt reputation in each county, ſhall be aſſigned to be keepers of the peace. But theſe being found rather too few for that purpoſe, it was provided by ſtatute 34 Edw. III. c. 1. that one lord, and three, or four, of the moſt worthy men in the county, with ſome learned in the law, ſhall be made juſtices in every county. But afterwards the number of juſtices, through the ambition of private perſons, became ſo large, that it was thought neceſſary by ſtatute 12 Ric. II. c. 10. and 14 Ric. II. c. 11. to reſtrain them at firſt to ſix, and after-

[i] Lamb. 43.

[k] See the form itſelf, Lamb. 35.

[l] Stat. 26 Geo. II. c. 27. See alſo ſtat. 7 Geo. III. c. 21. Burn. tit. Juſtices, § 1.

wards

wards to eight only. But this rule is now diſregarded, and the cauſe ſeems to be, (as Lambard obſerved long ago[m],) that the growing number of ſtatute laws, committed from time to time to the charge of juſtices of the peace, have occaſioned alſo (and very reaſonably) their encreaſe to a larger number. And, as to their qualifications, the ſtatutes juſt cited direct them to be of the beſt reputation, and moſt worthy men in the county: and the ſtatute 13 Ric. II. c. 7. orders them to be of the moſt ſufficient knights, eſquires, and gentlemen of the law. Alſo by ſtatute. 2 Hen V. ſt. 1. c. 4. and ſt. 2. c 1. they muſt be reſident in their ſeveral counties. And becauſe, contrary to theſe ſtatutes, men of ſmall ſubſtance had crept into the commiſſion, whoſe poverty made them both covetous and contemptible, it was enacted by ſtatute 18 Hen. VI. c. 11. that no juſtice ſhould be put in commiſſion, if he had not lands to the value of 20*l. per annum*. And, the rate of money being greatly altered ſince that time, it is now enacted by ſtatute 5 Geo. II. c. 18. that every juſtice, except [353] as is therein excepted, ſhall have 100*l. per annum* clear of all deductions (12); and, if he acts without ſuch qualification, he ſhall forfeit 100*l.* This qualification[n] is almoſt an equivalent to the 20*l. per annum* required in Henry the ſixth's time: and of this[o] the juſtice muſt now make oath. Alſo it is provided by the act 5 Geo. II. that no practiſing attorney,

[m] Lamb. 34.
[n] See biſhop Fleetwood's calculations in his *chronicon pretioſum*.
[o] Stat. 18 Geo. II. c. 20.

(12) The 18 Geo. II. c. 20. is the laſt ſtatute which preſcribes the qualifications of juſtices of the peace. This clear eſtate of 100*l. per annum*, may conſiſt either in freehold or copyhold, an eſtate of inheritance or for life, or even in a term for 21 years. A reverſion or remainder after one or more lives of the value of 300*l. per annum* is alſo a qualification. But this does not extend to corporation juſtices, or to the eldeſt ſons of peers, and of gentlemen qualified to be knights of ſhires, the officers of the board of green cloth, principal officers of the navy, under ſecretaries of ſtate, heads of colleges, or to the mayors of Cambridge and Oxford, all of whom may act without any qualification by eſtate.

ſolicitor, or proctor, ſhall be capable of acting as a juſtice of the peace (13).

As the office of theſe juſtices is conferred by the king, ſo it ſubſiſts only during his pleaſure; and is determinable, 1. By the demiſe of the crown; that is, in ſix months after[p]. But if the ſame juſtice is put in commiſſion by the ſucceſſor, he ſhall not be obliged to ſue out a new *dedimus*, or to ſwear to his qualification afreſh[q]: nor, by reaſon of any new commiſſion, to take the oaths more than once in the ſame reign[r]. 2. By expreſs writ under the great ſeal[s], diſcharging any particular perſon from being any longer juſtice. 3. By ſuperſeding the commiſſion by writ of *ſuperſedeas*, which ſuſpends the power of all the juſtices, but does not totally deſtroy it; ſeeing it may be revived again by another writ, called a *procedendo*. 4. By a new commiſſion, which virtually, though ſilently, diſcharges all the former juſtices that are not included therein; for two commiſſions cannot ſubſiſt at once. 5. By acceſſion of the office of ſheriff or coroner[t] (14). Formerly it was thought, that if a man was named in any commiſſion of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer anſwering the deſcription of the commiſſion: but now[u] it is provided, that, notwithſtanding a new title of dignity, the juſtice on whom it is conferred ſhall ſtill continue a juſtice.

THE power, office, and duty of a juſtice of the peace depend on his commiſſion, and on the ſeveral ſtatutes which

[p] Stat. 1 Ann. c. 8.
[q] Stat. 1 Geo. III. c. 13.
[r] Stat. 7 Geo. III. c. 9.
[s] Lamb. 67.
[t] Stat. 1 Mar. & 1. c. 8.
[u] Stat. 1 Edw. VI. c. 7.

(13) For any county.

(14) A ſheriff cannot act as a juſtice during the year of his office; but neither the ſtatute referred to, nor I apprehend any other ſtatute, diſqualifies a coroner from acting as a juſtice of the peace; nor do the two offices in their nature ſeem incompatible.

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have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the antient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions (15), of which more will be said in it's proper place. And as to the powers given to one, two (16), or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office [w]; which, among other privileges, prohibit such justices from being sued for any oversights without notice

[w] Stat. 7 Jac. I. c. 5. 21 Jac. I. c. 12. 24 Geo. II. c. 44.

(15) The sessions cannot be held without the presence of two justices.

(16) Where a statute requires any act to be done by two justices, it is in general an established rule, that, if the act is of a judicial nature, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void; as in orders of removal and filiation, the appointment of overseers, and the allowance of the indenture of a parish apprentice; but where the act is merely ministerial, they may act separately, as in the allowance of a poor rate. This is the only act of two justices, which has yet been construed to be ministerial; and the propriety of this construction has been justly questioned. 3 *T. Rep.* 380.

But it has been held, that an order of removal signed by two justices separately is not void but voidable, and can only be avoided by an appeal to the sessions. 4 *T. R.* 596.

beforehand;

beforehand; and ſtop all ſuits begun, on tender made of ſufficient amends (17). But, on the other hand, any malicious or tyrannical abuſe of their office is uſually ſeverely

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(17) It behoves every magiſtrate to be acquainted with the law and the extent of his authority, and he may be compelled to make an adequate compenſation to thoſe who ſuffer by his ignorance or inadvertence: but to protect him from being haraſſed by vexatious actions, it is provided, that he ſhall have notice of any action commenced againſt him, and the cauſe of it, one month before the writ is ſued out, or a copy of it ſerved upon him, by a writing from the attorney of the party, who ſhall indorſe upon it his name and reſidence, The magiſtrate may afterwards tender amends, and plead ſuch tender with the general iſſue and any other plea. And if the ſum tendered be thought ſufficient by the jury, he ſhall obtain a verdict with coſts. This action muſt be commenced within ſix months after the injury complained of. 24 *Geo. II. c.* 44.

But if a magiſtrate abuſes the authority repoſed in him by the law, in order to gratify his malice, or promote his private intereſts or ambition, he may be puniſhed alſo criminally by indictment or information. But the court of king's bench have frequently declared, that though a juſtice of peace ſhould act illegally, yet, if he has acted honeſtly and candidly, without any bad view or ill intention whatſoever, the court will never puniſh him, by the extraordinary mode of an information, but will leave the party complaining to the ordinary method of proſecution by action or indictment. 2 *Bur.* 1162. And in no caſe will the court grant an information unleſs an application for it is made within the ſecond term after the offence committed, and notice of the application be previouſly given to the juſtice, and unleſs the party injured will undertake to bring no action. And if the party proceeds both by action and indictment, the attorney general will grant a *noli proſequi* to the indictment. Indeed, where a juſtice has committed an involuntary error, without any corrupt motive or intention, it may be queſtioned whether it is an indictable offence; for the act in that caſe is either null and void, or the juſtice is anſwerable in damages for all the conſequences of it. It is the object of all puniſhment to prevent a repetition of the act; and it would be abſurd to puniſh a man for an involuntary act, or for that which he has neither power nor will to avoid.

puniſhed;

puniſhed; and all perſons who recover a verdict againſt a juſtice, for any wilful or malicious injury, are intitled to double coſts (18).

IT is impoſſible upon our preſent plan to enter minutely into the particulars of the accumulated authority, thus committed to the charge of theſe magiſtrates. I muſt therefore refer myſelf at preſent to ſuch ſubſequent part of theſe commentaries, as will in their turns comprize almoſt every object of the juſtices' juriſdiction: and in the mean time recommend to the ſtudent the peruſal of Mr. Lambard's *eirenarcha*, and Dr. Burn's *juſtice of the peace*; wherein he will find every thing relative to this ſubject, both in antient and modern practice, collected with great care and accuracy, and diſpoſed in a moſt clear and judicious method.

I SHALL next conſider ſome officers of lower rank than [355] thoſe which have gone before, and of more confined juriſdiction; but ſtill ſuch as are univerſally in uſe through every part of the kingdom.

IV. FOURTHLY, then, of the conſtable. The word *conſtable* is frequently ſaid to be derived from the Saxon, koning-ſtapel, and to ſignify the ſupport of the king. But, as we borrowed the name as well as the office of conſtable from the French, I am rather inclined to deduce it, with ſir Henry Spelman and Dr. Cowel, from that language: wherein it is plainly derived from the Latin *comes ſtabuli*, an officer well known in the empire; ſo called, becauſe, like the great conſtable of France, as well as the lord high conſtable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horſeback (19). This great office of lord high conſtable hath

(18) That is, where the judge certifies in court that the injury was wilful and malicious.

(19) We may form a judgment of his power, and the condition of the people of this country in the fifteenth century, from the

been diſuſed in England, except only upon great and ſolemn occaſions, as the king's coronation and the like, ever ſince the attainder of Stafford duke of Buckingham under king Henry VIII; as in France it was ſuppreſſed about a century after by an edict of Louis XIII [x]: but from his office, ſays Lambard [y], this lower conſtableſhip was at firſt drawn and fetched, and is as it were a very finger of that hand. For the ſtatute of Wincheſter [z], which firſt appoints them, directs that, for the better keeping of the peace, two conſtables in every hundred and franchiſe ſhall inſpect all matters relating to *arms* and *armour*.

CONSTABLES are of two ſorts, high conſtables, and petty conſtables. The former were firſt ordained by the ſtatute of Wincheſter, as before-mentioned; are appointed at the court leets of the franchiſe or hundred over which they preſide, or, in default of that, by the juſtices at their quarter
[356] ſeſſions; and are removable by the ſame authority that appoints them [a]. The petty conſtables are inferior officers in every town and pariſh, ſubordinate to the high conſtable of the hundred, firſt inſtituted about the reign of Edw. III [b]. Theſe petty conſtables have two offices united in them; the one antient, the other modern. Their antient office is that of headborough, tithing-man, or borſholder; of whom we formerly ſpoke [c], and who are as antient as the time of king Alfred: their more modern office is that of conſtable merely; which was appointed (as was obſerved) ſo lately as the reign of Edward III, in order to aſſiſt the high conſtable [d]. And

[x] Philip's life of Pole. ii. 111.
[y] of conſtables. 5.
[z] 13 Edw. I. c. 6.
[a] Salk. 150.
[b] Spelm. Gloſſ 148.
[c] page 115.
[d] Lamb. 9.

the following clauſe in a commiſſion in the 7 Edw. IV. to Richard earl Rivers: *Plenam poteſtatem et auctoritatem damus et committimus ad cognoſcendum et procedendum in omnibus et ſingulis cauſis et negotiis de et ſuper crimine læſe majeſtatis, ſeu ipſius occaſione, cæteriſque cauſis quibuſcunque, ſummariè et de plano, ſine ſtrepitu et figurâ judicii, ſolâ facti veritate inſpectâ.* Rym. Foed. tom xi. p. 582.

in

in general the antient headboroughs, tithing-men, and borſholders, were made uſe of to ſerve as petty conſtables; though not ſo generally, but that in many places they ſtill continue diſtinct officers from the conſtable. They are all choſen by the jury at the court leet; or if no court leet be held, are appointed by two juſtices of the peace[e].

THE general duty of all conſtables, both high and petty, as well as of the other officers, is to keep the king's peace in their ſeveral diſtricts; and to that purpoſe they are armed with very large powers, of arreſting, and impriſoning, of breaking open houſes, and the like: of the extent of which powers, conſidering what manner of men are for the moſt part put into theſe offices, it is perhaps very well that they are generally kept in ignorance (20). One of their principal duties, ariſing from the ſtatute of Wincheſter, which appoints them, is to keep watch and ward in their reſpective juriſdictions. Ward, guard, or *cuſtodia*, is chiefly applied to the day time, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the diſcretion of the juſtices of the peace and the conſtable[f]: the hundred being however anſwerable for all robberies committed therein, by day light, for having kept negligent guard. Watch is properly applicable to the night only, (being called among our Teutonic anceſtors *wacht* or *wacta*[g]) and it begins at the time when ward ends, and ends when that begins: [357] for, by the ſtatute of Wincheſter, in walled towns the gates ſhall be cloſed from ſunſetting to ſunriſing, and watch ſhall be kept in every borough and town, eſpecially in the ſummer ſeaſon, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themſelves. The conſtable may appoint watchmen, at his diſcretion, regulated by the cuſtom of the place; and theſe, being his deputies,

[e] Stat. 14 & 15 Car. II. c. 12.
[f] Dalt. juſt. c. 104.
[g] *Excubias et explorationes quas wactas vocant. Capitular. Hludov. Pii, cap. 1. A. D. 815.*

(20) If their powers are dangerous, they ought to be curtailed by the legiſlature; but ſurely every officer ought to know the extent of his duty and authority.

have for the time being the authority of their principal. But, with regard to the infinite number of other minute duties, that are laid upon conſtables by a diverſity of ſtatutes, I muſt again refer to Mr. Lambard and Dr. Burn; in whoſe compilations may be alſo ſeen, what powers and duties belong to the conſtable or tithing-man indifferently, and what to the conſtable only: for the conſtable may do whatever the tithing-man may; but it does not hold *e converſo*, the tithing-man not having an equal power with the conſtable.

V. WE are next to conſider the ſurveyors of the high-ways. Every pariſh is bound of common right to keep the high roads, that go through it, in good and ſufficient repair; unleſs by reaſon of the tenure of lands, or otherwiſe, this care is conſigned to ſome particular private perſon. From this burthen no man was exempt by our antient laws, whatever other immunities he might enjoy: this being part of the *trinoda neceſſitas*, to which every man's eſtate was ſubject; viz. *expeditio contra hoſtem, arcium conſtructio, et pontium reparatio.* For, though the reparation of bridges only is expreſſed, yet that of roads alſo muſt be underſtood; as in the Roman law, *ad inſtructiones reparationeſque itinerum et pontium, nullum genus hominum, nullique dignitatis ac veneration is meritis, ceſſare oportet*[h]. And indeed now, for the moſt part, the care of the roads only ſeems to be left to pariſhes; that of bridges being in great meaſure devolved upon the county at large, by ſtatute 22 Hen. VIII. c. 5. If the pariſh neglected theſe repairs, they might formerly, as they may ſtill, be
[358] indicted for ſuch their neglect: but it was not then incumbent on any particular officer to call the pariſh together, and ſet them upon this work; for which reaſon by the ſtatute 2 & 3 Ph. & M. c. 8. ſurveyors of the highways were ordered to be choſen in every pariſh[i].

THESE ſurveyors were originally, according to the ſtatute of Philip and Mary, to be appointed by the conſtable and church-wardens of the pariſh; but now they are conſti-

[h] C. 11. 74. 4.

[i] This office, Mr. Dalton (juſt. cap. 50.) ſays, exactly anſwers that of the *curatores viarum* of the Romans; but it ſhould ſeem that theirs was an office of rather more dignity and authority than ours: not only from comparing the method of making and mending the Roman ways

tuted by two neighbouring juſtices, out of ſuch inhabitants or others, as are deſcribed in ſtatute 13 Geo. III. c. 78. and may have ſalaries allotted them for their trouble.

THEIR office and duty conſiſts in putting in execution a variety of laws for the repairs of the public highways; that is, of ways leading from one town to another: all which are now reduced into one act by ſtatute 13 Geo. III. c. 78. which enacts, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them; who is liable to penalties on non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the pariſh, ſix days in every year, to labour in fetching materials or repairing the highways: all perſons keeping draughts (of three horſes, &c.) or occupying lands, being obliged to ſend a team for every draught, and for every 50*l.* a year, which they keep or occupy; perſons keeping leſs than a draught, or occupying leſs than 50*l.* a year, to contribute in a leſs proportion; and all other perſons chargeable, between the ages of eighteen and ſixty-five, to work or find a labourer. But they may compound with the ſurveyors, at certain eaſy rates eſtabliſhed by the act. And every cartway leading to any market-town muſt be made twenty feet wide at the leaſt, if the fences will permit; and may be increaſed by two juſtices, at the expenſe of the pariſh, to the breadth of thirty feet (21). 3. The ſurveyors may

ways with thoſe of our country pariſhes; but alſo becauſe one Thermus, who was the curator of the Flaminian way, was candidate for the conſulſhip with Julius Cæſar. (*Cic. ad Attic. l.* 1. *ep.* 1.)

(21) Two juſtices, where they think it will render the road more commodious, may order it to be diverted; the power to enlarge does not extend to pull down any building; or to take in the ground of any garden, park, paddock, court, or yard.

No tree or buſh ſhall be permitted to grow in any highway, within fifteen feet from the centre of it, except for ornament or ſhelter to a houſe; and the owners of the adjoining lands may be compelled to cut their hedges, ſo as not to exclude the ſun and wind from the highway. Fines awarded by the court for not repairing a highway, ſhall not be returned into the exchequer, but ſhall be applied to the repair of the highways as the court ſhall direct.

lay out their own money in purchaſing materials for repairs, in erecting guide-poſts, and making drains, and ſhall be reimburſed by a rate, to be allowed at a ſpecial ſeſſions. 4. In caſe the perſonal labour of the pariſh be not ſufficient, the ſurveyors, with the conſent of the quarter ſeſſions, may levy a rate on the pariſh, in aid of the perſonal duty, not exceeding, in any one year, together with the other highway rates, the ſum of 9 *d.* in the pound; for the due application of which they are to account upon oath. As for turnpikes, which are now pretty generally introduced in aid of ſuch rates, and the law relating to them, theſe depend principally on the particular powers granted in the ſeveral road acts, and upon ſome general proviſions which are extended to all turnpike roads in the kingdom, by ſtatute 13 Geo. III. c. 84. amended by many ſubſequent acts [k].

VI. I PROCEED therefore, laſtly, to conſider the overſeers of the poor; their original, appointment, and duty.

THE poor of England, till the time of Henry VIII, ſubſiſted entirely upon private benevolence, and the charity of well

[k] Stat. 14 Geo. III. c. 14. 36. 57. 82. 16 Geo. III. c. 39. 18 Geo. III. c. 28.

But the general highway act, the 13 Geo. III. is far too long to give an adequate repreſentation of it in an abridgment. Thoſe who are intereſted in it muſt conſult the ſtatute at large; or the title, *Highway*, in Burn's Juſtice, where it is fully ſtated.

Further regulations reſpecting the performance of ſtatute duty have been made by the 34 Geo. III. c. 74. which gives a power to two juſtices to exempt poor perſons according to their diſcretion, from the payment of aſſeſſments towards the highways. The preamble to the 34 Geo. III. c. 64. ſtates that it frequently happens, that the boundaries of two pariſhes paſs through the middle of a common highway, ſo that one ſide is ſituated in, and liable to be repaired by, one pariſh, and the other by the adjoining pariſh, which has been found to be inconvenient; it therefore enacts that two juſtices of the peace ſhall have power to divide ſuch a road between the two pariſhes by a tranſverſe line or boundary. And either pariſh diſcontented with that diviſion may appeal to the quarter ſeſſions, whoſe deciſion ſhall be final.

diſpoſed

diſpoſed chriſtians(22). For, though it appears by the mirrour[1], that by the common law the poor were to be "ſuſ-"tained by parſons, rectors of the church, and the pariſhi-"oners; ſo that none of them die for default of ſuſte-"nance;" and though by the ſtatutes 12 Ric. II. c. 7. and 19 Hen. VII. c. 12. the poor are directed to abide in the cities or towns wherein they were born, or ſuch wherein they had dwelt for three years, (which ſeem to be the firſt rudiments of pariſh ſettlements,) yet till the ſtatute 27 Hen. VIII. c. 25. I find no compulſory method chalked out for this purpoſe: but the poor ſeem to have been left to ſuch relief as the humanity of their neighbours would afford them. The monaſteries were, in particular, their principal reſource; and, among other bad effects which attended the monaſtic inſtitutions, it was not perhaps one of the leaſt (though frequently eſteemed quite otherwiſe) that they ſupported and fed a very numerous and very idle poor, whoſe ſuſtenance depended upon what was daily diſtributed in alms at the gates of the religious houſes. But, upon the total diſſolution of theſe, [360] the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of ſtatutes were made in the reign of king Henry the eighth and his children, for providing for the poor and impotent; which, the preambles to ſome of them recite, had of late years greatly increaſed. Theſe poor were principally of two ſorts: ſick and impotent, and therefore unable to work; idle and ſturdy, and therefore able, but not willing, to exerciſe any honeſt employment. To provide in ſome meaſure for both of theſe, in and about the metropolis, Edward the ſixth founded three royal hoſpitals; Chriſt's and St. Thomas's, for the relief of the impotent through infancy or ſickneſs; and Bridewell for the puniſhment and employment of the vigorous and idle. But theſe were far from being ſufficient for the care of the poor throughout the kingdom at large: and therefore, after many

[1] c. 1. § 3.

(22) The poor in Ireland, to this day, have no relief but from private charity. 2 *Ld. Mountm.* 118.

other fruitleſs experiments, by ſtatute 43 Eliz. c. 2. overſeers of the poor were appointed in every pariſh.

BY virtue of the ſtatute laſt mentioned, theſe overſeers are to be nominated yearly in Eaſter-week, or within one month after, (though a ſubſequent nomination will be valid [m]) by two juſtices dwelling near the pariſh. They muſt be ſubſtantial houſeholders, and ſo expreſſed to be in the appointment of the juſtices [n] (23).

THEIR office and duty, according to the ſame ſtatute, are principally theſe: firſt, to raiſe competent ſums for the neceſſary relief of the poor, impotent, old, blind, and ſuch other, being poor and not able to work: and ſecondly, to provide work for ſuch as are able, and cannot otherwiſe get employment: but this latter part of their duty, which, according to the wiſe regulations of that ſalutary ſtatute, ſhould go hand in hand with the other, is now moſt ſhamefully neglected. However, for theſe joint purpoſes, they are impowered to [361] make and levy rates upon the ſeveral inhabitants of the pariſh, by the ſame act of parliament; which has been farther explained and enforced by ſeveral ſubſequent ſtatutes.

THE two great objects of this ſtatute ſeem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for ſuch as are able to work: and this principally by providing ſtocks of raw materials to be worked up at

[m] Stra. 1123. [n] 2 Lord Raym. 1394.

(23) It is declared by the ſtatute, that the church-wardens of every pariſh ſhall be overſeers of the poor; beſides theſe the juſtices may appoint two, three, or four, but not more, of the inhabitants overſeers for each pariſh. (1 *Burr.* 446.) But if a pariſh is divided into townſhips, and is ſo large, that ſome townſhips cannot reap the benefit intended by the 43 of Elizabeth, in that caſe, ſeparate overſeers may be appointed for ſuch townſhips, under the 13 & 14 Car. II. c. 12. Wherever there is a conſtable, there is a townſhip. 1 *T. R.* 374.

A woman may be appointed an overſeer of the poor, if a ſubſtantial houſeholder. 2 *T. R.* 395.

their

their ſeparate homes, inſtead of accumulating all the poor in one common work-houſe; a practice which puts the ſober and diligent upon a level (in point of their earnings) with thoſe who are diſſolute and idle, depreſſes the laudable emulation of domeſtic induſtry and neatneſs, and deſtroys all endearing family connexions, the only felicity of the indigent. Whereas, if none were relieved but thoſe who are incapable to get their livings, and that in proportion to their incapacity: if no children were removed from their parents, but ſuch as are brought up in rags and idleneſs; and if every poor man and his family were regularly furniſhed with employment, and allowed the whole profits of their labour;—a ſpirit of buſy cheerfulneſs would ſoon diffuſe itſelf through every cottage; work would become eaſy and habitual, when abſolutely neceſſary for daily ſubſiſtence; and the peaſant would go through his taſk without a murmur, if aſſured that he and his children (when incapable of work through infancy, age, or infirmity) would then, and then only, be entitled to ſupport from his opulent neighbours.

THIS appears to have been the plan of the ſtatute of queen Elizabeth; in which the only defect was confining the management of the poor to ſmall, parochial, diſtricts; which are frequently incapable of furniſhing proper work, or providing an able director. However, the laborious poor were then at liberty to ſeek employment wherever it was to be had: none being obliged to reſide in the places of their ſettlement, but ſuch as were unable or unwilling to work; and thoſe places of ſettlement being only ſuch where they were *born*, or had made their *abode*, originally for three years [o], and [362] afterwards (in the caſe of vagabonds) for one year only [p].

AFTER the reſtoration a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the ſubdiviſion of pariſhes; has greatly increaſed their number, by confining them all to their reſpective diſtricts; has given birth to the intricacy of our poor-laws, by multiplying and rendering more eaſy the methods of

[o] Stat. 19 Hen. VII. c. 12. 1 Edw. VI. c. 3. 3 Edw. VI. c. 16. 14 Eliz. c. 5.
[p] Stat. 39 Eliz. c. 4.

gaining ſettlements; and, in conſequence, has created an infinity of expenſive law-ſuits between contending neighbourhoods, concerning thoſe ſettlements and removals. By the ſtatute 13 & 14 Car. II. c. 12. a legal ſettlement was declared to be gained by *birth*; or by *inhabitancy*, *apprenticeſhip*, or *ſervice*, for forty days: within which period all intruders were made removable from any pariſh by two juſtices of the peace, unleſs they ſettled in a tenement of the annual value of 10*l.* The frauds, naturally conſequent upon this proviſion, which gave a ſettlement by ſo ſhort a reſidence, produced the ſtatute 1 Jac. II. c. 17. which directed *notice* in writing to be delivered to the pariſh officers, before a ſettlement could be gained by ſuch reſidence. Subſequent proviſions allowed other circumſtances of notoriety to be equivalent to ſuch notice given; and thoſe circumſtances have from time to time been altered, enlarged, or reſtrained, whenever the experience of new inconveniencies, ariſing daily from new regulations, ſuggeſted the neceſſity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoiſe, to reſtrain a man and his family from acquiring a new ſettlement by any length of reſidence whatever, unleſs in two particular excepted caſes; which makes pariſhes very cautious of giving ſuch certificates, and of courſe confines the poor at home, where frequently no adequate employment can be had (24).

(24) By 13 and 14 Car. II. c. 12. all perſons who are likely to become chargeable, unleſs they ſettle upon a tenement of the yearly value of 10*l.* may be removed to the places where they are legally ſettled. This ſtatute was certainly a great infringement of *magna charta* and the liberty of the ſubject; as nothing can be more cruel or impolitic, than to prevent a perſon from reſiding in that ſituation where, by his induſtry and occupation, he can beſt procure a competent proviſion for himſelf and his family. To alleviate, in ſome degree, the hardſhip and inconvenience introduced by that ſtatute, the legiſlature has provided by the 8 & 9 W. III. c. 30. that if the major part of the churchwardens and overſeers of any pariſh or townſhip will grant a certificate under their hands and ſeals, atteſted by two witneſſes, and allowed and ſubſcribed by two juſtices, acknowledging a perſon and his family therein ſpecified, to have a legal ſettlement in their pariſh or townſhip, ſuch perſon may afterwards

THE law of ſettlements may be therefore now reduced to the following general heads; or, a ſettlement in a pariſh may

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wards go into any pariſh; and having delivered this certificate to the pariſh officers, neither he nor his family are removable from thence till they are actually chargeable. But as the object of the certificate was to prevent him from bringing any incumbrance upon the pariſh where he is thus permitted to reſide, by the 9 and 10 W. III. c. 11. he is reſtrained from gaining a ſettlement where he lives under the protection of the certificate by any means whatever, except by renting a tenement of the yearly value of 10*l.* and by a reſidence in the pariſh for forty days, or by executing an annual office. But beſides theſe two caſes mentioned in the act, it has been held, that a certificate perſon may gain a ſettlement by reſiding upon (or having in the pariſh where he reſides) any eſtate whatever of his own, provided, if it has been actually purchaſed by him, he has *bonâ fide* paid 30*l.* for it. *Str.* 163. 1193. *Burr. S. C.* 220. A certificate is concluſive upon the pariſh granting it, with reſpect to the pariſh to which it is granted or firſt delivered; but it is not ſo with regard to other pariſhes; for though it will be *primâ facie* evidence againſt the pariſh granting it, yet it may be repelled by other evidence; and they may be permitted to ſhew, that they gave it under a miſtake, and in their own wrong. 4 *T. R.* 251.

A certificate extends to children born after it is granted, but not to the grand-children of the *pater-familias*. 4 *T. R.* 797.

But the object of granting certificates is now put an end to by the 35 Geo. III. c. 101. which enacts that no perſon ſhall be removed by an order of removal till he becomes actually chargeable. But every unmarried woman with child ſhall be deemed to be actually chargeable, and alſo all perſons convicted of any felony, and rogues, vagabonds, and idle or diſorderly perſons, and perſons of evil fame, or reputed thieves not giving a ſatisfactory account of themſelves, may be removed, as if they were actually chargeable. And where a pauper is ordered to be removed by an order of removal, or a vagrant paſs, in caſe of the ſickneſs of the pauper, the juſtices making ſuch an order may direct the execution of it to be ſuſpended; and in the caſe of an order of removal, the expences of the maintenance of the pauper during ſuch ſuſpenſion ſhall be born by the pariſh to which the order of removal ſhall be made. And if an unmarried woman is delivered of a child during ſuch ſuſpenſion, it ſhall be ſettled in the pariſh which at the time of the birth was the legal ſettlement of the mother.

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be acquired, 1. By *birth*; for, wherever a child is firſt known to be, that is always *prima facie* the place of ſettlement, until ſome other can be ſhewn[q]. This is alſo generally the place of ſettlement of a baſtard child[r]; for a baſtard having in the eye of the law no father, cannot be referred to *his* ſettlement, as other children may[s]. But, in legitimate children, though the place of birth be *prima facie* the ſettlement, yet it is not concluſively ſo; for there are, 2. Settlements by *parentage*, being the ſettlement of one's father or mother: all legitimate children being really ſettled in the pariſh where their parents are ſettled, until they get a new ſettlement for themſelves[t] (25). A new ſettlement may be acquired ſeveral ways; as, 3. By *marriage*. For a woman, marrying a man that is ſettled in another pariſh, changes her own ſettlement: the law not permitting the ſeparation of huſband and wife[u]. But if the man has no ſettlement, her's is ſuſpended during his life, if he remains in England and is able to maintain her; but in his abſence, or after his death, or during (perhaps) his inability, ſhe may be removed to her old ſettlement[w] (26). The other methods of acquiring ſettlements in

[q] Carth. 433. Comb. 364. Salk. 485. 2 Lord Raym. 567.
[r] See p. 459.
[s] Salk. 427.
[t] Salk. 528. 2 Lord Raym. 1473.
[u] Stra. 544.
[w] Foley. 249. 252, 252. Burr. Sett. C. 370.

(25) If the parents acquire a new ſettlement, the children alſo follow, and belong to the laſt ſettlement of the father, or after the death of the father, to the laſt ſettlement of the mother, till they are emancipated or become independent of their father's or mother's family, and in that caſe they have that ſettlement which their parent had at the time of emancipation.

This is a very indefinite word, and it is no wonder that ſeveral caſes have ariſen upon the interpretation of it. Lord Kenyon ſeems to have given as full and as juſt an explication of it, as it will admit, in obſerving, that "the caſes of emancipation have always "been decided on the circumſtances either of the ſon's being "twenty-one, or married, or having contracted a relation, which "was inconſiſtent with the idea of his being in a ſubordinate ſitu-"ation in his father's family." 3 *T. R.* 356.

(26) In the abſence or after the death of the huſband, in that caſe the wife and her children may be removed to her maiden ſettlement;

any parish are all reducible to this one, of *forty days residence* therein: but this forty days residence (which is construed to be lodging or lying there) must not be by fraud, or stealth, or in any clandestine manner; but made notorious, by one or other of the following concomitant circumstances. The next method therefore of gaining a settlement, is, 4. By forty days residence, and *notice*. For if a stranger comes into a parish, and delivers notice in writing of his place of abode, and number of his family, to one of the overseers, (which must be read in the church and registered,) and resides there unmolested for forty days after such notice, he is legally settled thereby[w]. For the law presumes that such a one at the time of notice is not likely to become chargeable, else he would not venture to give it; or that in such case, the parish would take care to remove him(27). But there are also other circumstances equivalent to such notice: therefore, 5. *Renting* for a year(28) a [364] tenement of the yearly value of ten pounds, and residing forty

[w] Stat. 13 & 14 Car. II. c. 12. 1 Jac. II. c. 17. 3 & 4 W. and Mar. c. 11.

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settlement; but it seems fully determined that they cannot be separated or removed from the husband. (*Bur. S. C.* 813. 1 *Stra.* 544.) The consequence is, that the whole family must be supported as casual poor in the parish where they may happen to want relief. In the removal of a wife or a widow, it is sufficient in the first instance to prove her maiden settlement. *Cald.* 39. 236.

(27) By the 35 Geo. III. c. 101. it is enacted that no person in future shall gain a settlement by such a notice.

(28) It is not necessary that the renting should be for a year; if a tenement of the yearly value of 10*l.* be taken for two months or 40 days only, it will be sufficient to give a settlement. (*Bur. S. C.* 474.) Nor is it necessary there should be any house upon the premises, even a renting of the after-grass or pasturage will be sufficient. (4 *T. R.* 348.) A person gains a settlement by residing in the parish in which part of the premises lies, but not by residing elsewhere. (2 *T. R.* 48.) It need not be one entire tenement; for if he takes one tenement in one parish, and another in a different parish, if together they are of the value of 10*l.* a year, he will gain a settlement by residing in either parish; the value only is material: it will be sufficient to give a settlement, if the enjoyment of the tenement is gratuitous, or if no rent is to be paid for it. 1 *T. R.* 458.

days

days in the parish, gains a settlement without notice [x]; upon the principle of having substance enough to gain credit for such a house. 6. Being charged to and paying the public *taxes* and levies of the parish (29); (excepting those for scavengers, highways [y], and the duties on houses and windows [z]) and, 7. Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as church-warden, *&c.* are both of them equivalent to notice, and gain a settlement [a], if coupled with a residence of forty days. 8. Being *hired* for a year, when unmarried and childless (30), and *serving* a year in the same service; and 9. Being bound an *apprentice*, give the servant, and apprentice a settlement without notice [b], in that

[x] Stat. 13 & 14 Car. II. c. 12.
[y] Stat. 9 Geo. I. c. 7. § 6.
[z] Stat. 21 Geo. II. c. 10. 18 Geo. III. c. 26.
[a] Stat. 3 & 4 W. and M. c. 11.
[b] Stat. 3 & 4 W. and M. c. 11. 8 & 9 W. III. c. 10. 31 Geo. II. c. 11.

(29) By the 35 Geo. III. c. 101. the payment of taxes for a tenement of less yearly value than 10 *l.* will not give a settlement; so that this species of settlement is in effect abolished.

(30) A widower or widow with children emancipated is considered as childless, for such children cannot follow the settlement gained by their parent's service. 3 *Burn.* 445. If an unmarried man is hired for a year, but, before he enters upon the service, or during the service, marries, he may gain a settlement. 3 *T. R.* 382. But this will not extend to the continuance in the service a second year; for he was married when this new contract was expressly or impliedly entered into. *Cald.* 54. Hiring for any time certainly less than a year will not be sufficient; but from Whitsuntide to Whitsuntide is considered a year, though it will frequently happen to be a period less than 365 days. To gain a settlement as a servant there must be a hiring for a year, and a continued service for a year; but it is not necessary that the service should be subsequent to the hiring; for if there is a continued service for eleven months or any other part of a year, by any number or modes of hirings, or with any difference of wages, and afterwards a hiring for a year and a service to complete the year, a settlement is gained. *Cald.* 179. There seemed to be great reason to think that the service subsequent to the hiring for a year should at least be 40 days; but it is now decided that that is not necessary. (5 *T. R.* 98.) The settlement of a servant and an apprentice is where they last reside 40 days in their master's employ; and where they do not reside 40 days successively

place wherein they ſerve the laſt forty days. This is meant to encourage application to trades, and going out to reputable ſervices. 10. Laſtly, the having an *eſtate* of one's own, and reſiding thereon forty days, however ſmall the value may be, in caſe it be acquired by act of law or of a third perſon, as by deſcent, gift, deviſe, *&c.* is a ſufficient ſettlement[c]: but if a man acquire it by his own act, as by purchaſe, (in it's popular ſenſe, in conſideration of money paid,) then unleſs the conſideration advanced, *bona fide*, be 30*l.* it is no ſettlement for any longer time than the perſon ſhall inhabit thereon[d]. He is in no caſe removable from his own property; but he ſhall not, by any trifling or fraudulent purchaſe of his own, acquire a permanent and laſting ſettlement.

ALL perſons, not ſo ſettled, may be removed to their own pariſhes, on complaint of the overſeers, by two juſtices of the peace, if they ſhall adjudge them likely to become chargeable to the pariſh into which they have intruded: unleſs they are in a way of getting a legal ſettlement, as by having hired a houſe of 10*l. per annum*, or living in an annual ſervice; for then they are not removable[e]. And in all other caſes, if the pariſh to which they belong will grant them a certificate, acknowledging them to be *their* pariſhioners, they cannot be removed merely becauſe likely to become chargeable, but only when they become *actually* chargeable[f]. But ſuch certificated perſon can gain no ſettlement by any of the means above-mentioned (31); unleſs by renting a tenement of 10*l. per annum*, or by ſerving an annual office in the pariſh, being legally placed therein: neither can an apprentice or ſervant to ſuch certificated perſon gain a ſettlement by ſuch their ſervice[g]. [365]

[c] Salk. 524.
[d] Stat. 9 Geo. I. c. 7.
[e] Salk. 472.
[f] Stat. 8 & 9 W. III. c. 30.
[g] Stat. 12 Ann. c. 18.

ceſſively at one place, but alternately in two or more pariſhes, and more than 40 days upon the whole in each in the courſe of a year, the ſettlement is in that pariſh in which they ſleep the laſt night. *Doug.* 633.

(31) See note (24) of this chapter.

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THESE are the general heads of the laws relating to the poor, which, by the reſolutions of the courts of juſtice thereon within a century paſt, are branched into a great variety (32). And yet, notwithſtanding the pains that have been taken about them, they ſtill remain very imperfect, and inadequate to the purpoſes they are deſigned for: a fate, that has generally attended moſt of our ſtatute laws, where they have not the foundation of the common law to build on. When the ſhires, the hundreds, and the tithings, were kept in the ſame admirable order in which they were diſpoſed by the great Alfred, there were no perſons idle, conſequently none but the impotent that needed relief: and the ſtatute of 43 Eliz. ſeems entirely founded on the ſame principle. But when this excellent ſcheme was neglected and departed from, we cannot but obſerve with concern, what miſerable ſhifts and lame expedients have from time to time been adopted, in order to patch up the flaws occaſioned by this neglect. There is not a more neceſſary or more certain maxim in the frame and conſtitution of ſociety, than that every individual muſt contribute his ſhare, in order to the well-being of the community: and ſurely they muſt be very deficient in ſound policy, who ſuffer one half of a pariſh to continue idle, diſſolute, and unemployed; and at length are amazed to find, that the induſtry of the other half is not able to maintain the whole.

(32) For a full and complete knowledge of this extenſive ſubject, recourſe muſt be had to Burn's Juſtice, and Mr. Conſt's valuable edition of Bott, and the reporters there referred to.

CHAPTER THE TENTH.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

HAVING, in the eight preceding chapters, treated of perſons as they ſtand in the public relations of *magiſtrates*, I now proceed to conſider ſuch perſons as fall under the denomination of the *people*. And herein all the inferior and ſubordinate magiſtrates, treated of in the laſt chapter, are included.

THE firſt and moſt obvious diviſion of the people is into aliens and natural-born ſubjects. Natural-born ſubjects are ſuch as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king: and aliens, ſuch as are born out of it. Allegiance is the tie, or *ligamen*, which binds the ſubject to the king, in return for that protection which the king affords the ſubject. The thing itſelf, or ſubſtantial part of it, is founded in reaſon and the nature of government; the name and the form are derived to us from our Gothic anceſtors. Under the feodal ſyſtem, every owner of lands held them in ſubjection to ſome ſuperior or lord, from whom or whoſe anceſtors the tenant or vaſal had received them: and there was a mutual truſt or confidence ſubſiſting between the lord and vaſal, that the lord ſhould protect the vaſal in the enjoyment of the territory he had granted him, and, on the other hand, that the vaſal ſhould be faithful to the lord and [367] defend him againſt all his enemies. This obligation on the part of the vaſal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feodal law, to be taken by all tenants to their landlord, which is couched in almoſt

the ſame terms as our antient oath of allegiance[a]: except that in the uſual oath of fealty there was frequently a ſaving or exception of the faith due to a ſuperior lord by name, under whom the landlord himſelf was perhaps only a tenant or vaſal. But when the acknowlegement was made to the abſolute ſuperior himſelf, who was vaſal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant ſwore to bear faith to his ſovereign lord, in oppoſition to all men, without any ſaving or exception: "*contra omnes homines fidelitatem fecit*[b]." Land held by this exalted ſpecies of fealty was called *feudum ligium*, a liege fee; the vaſals *homines ligii*, or liege men; and the ſovereign their *dominus ligius*, or liege lord. And when ſovereign princes did homage to each other, for lands held under their reſpective ſovereignties, a diſtinction was always made between *ſimple* homage, which was only an acknowlegement of tenure[c]; and *liege* homage, which included the fealty before-mentioned, and the ſervices conſequent upon it. Thus when our Edward III, in 1329, did homage to Philip VI of France, for his ducal dominions on that continent, it was warmly diſputed of what ſpecies the homage was to be, whether *liege* or *ſimple* homage[d]. But with us in England, it becoming a ſettled principle of tenure, that *all* lands in the kingdom are holden of the king as their ſovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was neceſſarily confined to the perſon of the king alone. By an eaſy analogy the term of allegiance was ſoon brought to ſignify all other engagements, which are due from ſubjects to their prince, as well as thoſe duties which were ſimply and merely territo-
[368] rial. And the oath of allegiance, as adminiſtered for upwards of ſix hundred years[e], contained a promiſe "to be "true and faithful to the king and his heirs, and truth and "faith to bear of life and limb and terrene honour, and "not to know or hear of any ill or damage intended him,

[a] 2 *Feud.* 5, 6, 7.
[b] 2 *Feud.* 99.
[c] 7 Rep. Calvin's caſe. 7.
[d] 2 Cart. 401. Mod. Un. Hiſt. xxiii. 420.
[e] Mirror. c. 3. § 35. Fleta. 3. 16. Britton. c. 29. 7 Rep. Calvin's caſe. 6.

"without

or without defending him therefrom." Upon which ſir Matthew Hale [f] makes this remark; that it was ſhort and plain, not entangled with long or intricate clauſes or declarations, and yet is comprehenſive of the whole duty from the ſubject to his ſovereign. But, at the revolution, the terms of this oath being thought perhaps to favour too much the notion of non-reſiſtance, the preſent form was introduced by the convention parliament, which is more general and indeterminate than the former; the ſubject only promiſing "that he will be faithful and bear *true* allegiance to the "king," without mentioning "his heirs," or ſpecifying in the leaſt wherein that allegiance conſiſts. The oath of ſupremacy is principally calculated as a renunciation of the pope's pretended authority: and the oath of abjuration, introduced in the reign of king William [g], very amply ſupplies the looſe and general texture of the oath of allegiance; it recognising the right of his majeſty, derived under the act of ſettlement; engaging to ſupport him to the utmoſt of the juror's power; promiſing to diſcloſe all traiterous conſpiracies againſt him; and expreſsly renouncing any claim of the deſcendants of the late pretender, in as clear and explicit terms as the Engliſh language can furniſh. This oath muſt be taken by all perſons in any office, truſt, or employment; and may be tendered by two juſtices of the peace to any perſon, whom they ſhall ſuſpect of diſaffection [h]. And the oath of allegiance may be tendered [i] to all perſons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the ſheriff's tourn, which is the court-leet of the county.

BUT, beſides theſe expreſs engagements, the law alſo holds that there is an implied, original, and virtual allegiance, owing from every ſubject to his ſovereign, antecedently to any [369] expreſs promiſe; and although the ſubject never ſwore any faith or allegiance in form. For as the king, by the very deſcent of the crown, is fully inveſted with all the rights and bound to all the duties of ſovereignty, before his coronation;

[f] 1 Hal. P. C. 63.
[g] Stat. 13 W. III. c. 6.
[h] Stat. 1 Geo. I. c. 13. 6 Geo. III. c. 53.
[i] 2 Inſt. 121. 1 Hal. P. C. 64.

ſo the ſubject is bound to his prince by an intrinſic allegiance, before the ſuper-induction of thoſe outward bonds of oath, homage, and fealty; which were only inſtituted to remind the ſubject of this his previous duty, and for the better ſecuring it's performance [k]. The formal profeſſion therefore, or oath of ſubjection, is nothing more than a declaration in words of what was before implied in law. Which occaſions ſir Edward Coke very juſtly to obſerve [l], that "all ſubjects are equally bounden "to their allegiance, as if they had taken the oath; becauſe "it is written by the finger of the law in their hearts, and "the taking of the corporal oath is but an outward declara-"tion of the ſame." The ſanction of an oath, it is true, in caſe of violation of duty, makes the guilt ſtill more accumulated, by ſuperadding perjury to treaſon: but it does not increaſe the civil obligation to loyalty; it only ſtrengthens the *ſocial* tie by uniting it with that of *religion*.

ALLEGIANCE, both expreſs and implied, is however diſtinguiſhed by the law into two ſorts or ſpecies, the one natural, the other local; the former being alſo perpetual, the latter temporary. Natural allegiance is ſuch as is due from all men born within the king's dominions immediately upon their birth [m]. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themſelves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumſtance, nor by any thing but the united concurrence of the legiſlature [n]. An Engliſhman who removes to France, or to China, owes the ſame allegiance to the king of England there as at home, and twenty years hence as well as now. For it is
[370] a principle of univerſal law [o], that the natural-born ſubject of one prince cannot by any act of his own, no, not by ſwearing allegiance to another, put off or diſcharge his natural allegiance to the former: for this natural allegiance was intrinſic, and primitive, and antecedent to the other; and cannot be de-

[k] 1 Hal. P. C. 62.
[l] 2 Inſt. 121.
[m] 7 Rep. 7.
[n] 2 P. Wms. 124.
[o] 1 Hal. P. C. 68.

veſted

veſted without the concurrent act of that prince to whom it was firſt due. Indeed the natural-born ſubject of one prince, to whom he owes allegiance, may be entangled by ſubjecting himſelf abſolutely to another: but it is his own act that brings him into theſe ſtraits and difficulties, of owing ſervice to two maſters; and it is unreaſonable that, by ſuch voluntary act of his own, he ſhould be able at pleaſure to unlooſe thoſe bands, by which he is connected to his natural prince (1).

LOCAL allegiance is ſuch as is due from an alien, or ſtranger born, for ſo long time as he continues within the king's dominion and protection[p]: and it ceaſes, the inſtant ſuch ſtranger transfers himſelf from this kingdom to another (2).

[p] 7 Rep. 6.

(1) Sir Michael Foſter obſerves, that "the well known maxim, "which the writers upon our law have adopted and applied to "this caſe, *nemo poteſt exuere patriam*, comprehendeth the whole "doctrine of natural allegiance." *Foſt.* 184. And this is exemplified by a ſtrong inſtance in the report which that learned judge has given of Æneas Macdonald's caſe. He was a native of Great Britain, but had received his education from his early infancy in France, had ſpent his riper years in a profitable employment in that kingdom, and had accepted a commiſſion in the ſervice of the French king; acting under that commiſſion, he was taken in arms againſt the king of England, for which he was indicted and convicted of high treaſon; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Ib.* 59.

This is certainly an extreme caſe; and we ſhould have reaſon to think our law deficient in juſtice and humanity if we could diſcover any intermediate general limit, to which the law could be relaxed conſiſtently with ſound policy or the public ſafety.

(2) Mr. J. Foſter informs us, that it was laid down in a meeting of all the judges, that "if an alien, ſeeking the protection of "the crown, and having a family and effects here, ſhould, dur- "ing a war with his native country, go thither, and there adhere "to the King's enemies *for purpoſes of hoſtility*, he may be dealt "with as a traitor." *Foſt.* 185.

Natural allegiance is therefore perpetual, and local temporary only: and that for this reaſon, evidently founded upon the nature of government; that allegiance is a debt due from the ſubject, upon an implied contract with the prince, that ſo long as the one affords protection, ſo long the other will demean himſelf faithfully. As therefore the prince is always under a conſtant tie to protect his natural-born ſubjects, at all times and in all countries, for this reaſon their allegiance due to him is equally univerſal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his reſidence in this realm, the allegiance of an alien is confined (in point of time) to the duration of ſuch his reſidence, and (in point of locality) to the dominions of the Britiſh empire. From which conſiderations ſir Matthew Hale [q] deduces this conſequence, that, though there be an uſurper of the crown, yet it is treaſon for any ſubject, while the uſurper is in full poſſeſſion of the ſovereignty, to
[371] practiſe any thing againſt his crown and dignity: wherefore, although the true prince regain the ſovereignty, yet ſuch attempts againſt the uſurper (unleſs in defence or aid of the rightful king) have been afterwards puniſhed with death; becauſe of the breach of that temporary allegiance, which was due to him as king *de facto*. And upon this footing, after Edward IV recovered the crown, which had been long detained from his houſe by the line of Lancaſter, treaſons committed againſt Henry VI were capitally puniſhed; though Henry had been declared an uſurper by parliament.

THIS oath of allegiance, or rather the allegiance itſelf, is held to be applicable not only to the political capacity of the king, or regal office, but to his natural perſon and blood-royal: and for the miſapplication of their allegiance, viz. to the regal capacity or crown, excluſive of the perſon of the king, were the Spencers baniſhed in the reign of Edward II [r]. And from hence aroſe that principle of perſonal attachment, and affectionate loyalty, which induced our forefathers, (and, if occaſion required, would doubtleſs induce their ſons) to

[q] 1 Hal. P. C. 60. [r] 1 Hal. P. C. 67.

hazard

hazard all that was dear to them, life, fortune, and family, in defence and ſupport of their liege lord and ſovereign.

THIS allegiance then, both expreſs and implied, is the duty of all the king's ſubjects, under the diſtinctions here laid down, of local and temporary, or univerſal and perpetual. Their rights are alſo diſtinguiſhable by the ſame criterions of time and locality; natural-born ſubjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any diſtance of place or time, but only by their own miſbehaviour: the explanation of which rights is the principal ſubject of the two firſt books of theſe commentaries. The ſame is alſo in ſome degree the caſe of aliens; though their rights are much more circumſcribed, being acquired only by reſidence here, and loſt whenever they remove. I ſhall however here endeavour to chalk out ſome of the principal lines, whereby they [372] are diſtinguiſhed from natives, deſcending to farther particulars when they come in courſe.

AN alien born may purchaſe lands, or other eſtates: but not for his own uſe; for the king is thereupon entitled to them [s] (3). If an alien could acquire a permanent property in lands, he muſt owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconſiſtent with that, which he owes to his own natural liege lord: beſides that thereby the nation might in time be ſubject to foreign influence, and feel many other inconveniences. Wherefore by the civil law ſuch contracts were alſo made void [t]: but the prince had no ſuch advantage of forfeiture thereby, as with us in England. Among other reaſons which might be given for our conſtitution, it ſeems

[s] Co. Litt. 2. [t] Cod. l. 11. tit. 55.

(3) A woman alien cannot be endowed, unleſs ſhe marries by the licence of the king; and then ſhe ſhall be endowed, by 8 Hen. V. *No.* 15, *Rot. Parl. Harg. Co. Lit.* 31. *a.* n. 9. Neither can a huſband alien be tenant by the curteſy. 7 *Co.* 25.

to be intended by way of puniſhment for the alien's preſumption, in attempting to acquire any landed property: for the vendor is not affected by it, he having reſigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other perſonal eſtate, or may hire a houſe for his habitation [u] (4): for perſonal eſtate is of a tranſitory and moveable nature; and, beſides, this indulgence to ſtrangers is neceſſary for the advancement of trade. Aliens alſo may trade as freely as other people; only they are ſubject to certain higher duties at the cuſtom-houſe: and there are alſo ſome obſolete ſtatutes of Henry VIII, prohibiting alien artificers to work for themſelves in this kingdom; but it is generally held that they were virtually repealed by ſtatute 5 Eliz. c. 7. (5) Alſo an alien may bring an action concerning perſonal property, and may make a will, and diſpoſe of his perſonal eſtate [w]: not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus* [x], unleſs he has a peculiar exemption. When I mention theſe rights of an alien, I muſt be underſtood of alien friends only, or ſuch whoſe countries are in peace with ours; for alien enemies have no rights, no privileges, unleſs by the king's ſpecial favour, during the time of war (6).

WHEN I ſay, that an alien is one who is born out of the king's dominions, or allegiance, this alſo muſt be under-

[u] 7 Rep. 17.
[w] Lutw. 34.
[x] A word derived from *alibi natus*. Spelm. Gl. 24.

(4) But a leaſe of lands will be forfeited to the king. *Co. Litt.* 2.

(5) Mr. Hargrave ſays, the ſtatute 32 Hen. VIII. c. 16. however contrary it may ſeem to good policy and the ſpirit of commerce, ſtill remains unrepealed. *Co. Litt.* 2. n. 7. See alſo 1 *Woodd.* 373.

(6) Until all ranſoms of captured ſhips and property were prohibited by 22 Geo. III. c. 25. an alien enemy could ſue in our courts upon a ranſom bill. Lord Mansfield in a caſe of that kind declared, that "it was found policy, as well as good morality, to "keep faith with an enemy in time of war. This is a contract "which ariſes out of a ſtate of hoſtility, and is to be governed by "the law of nations, and the eternal rules of juſtice." *Doug.* 625.

ſtood with ſome reſtrictions. The common law indeed ſtood abſolutely ſo; with only a very few exceptions: ſo that a particular act of parliament became neceſſary after the reſtoration [y], "for the naturalization of children of his majeſty's "Engliſh ſubjects, born in foreign countries during the late "troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two ſuch allegiances, or ſerve two maſters, at once. Yet the children of the king's embaſſadors born abroad were always held to be natural ſubjects [z]: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is ſent; ſo, with regard to the ſon alſo, he was held (by a kind of *poſtliminium*) to be born under the king of England's allegiance, repreſented by his father, the embaſſador. To encourage alſo foreign commerce, it was enacted by ſtatute 25 Edw. III. ſt. 2. that all children born abroad, provided *both* their parents were at the time of his birth in allegiance to the king, and the mother had paſſed the ſeas by her huſband's conſent, might inherit as if born in England: and accordingly it hath been ſo adjudged in behalf of merchants [a]. But by ſeveral more modern ſtatutes [b] theſe reſtrictions are ſtill farther taken off: ſo that all children, born out of the king's ligeance, whoſe *fathers* (or *grandfathers* by the father's ſide) were natural-born ſubjects, are now deemed to be natural-born ſubjects themſelves, to all intents and purpoſes; unleſs their ſaid anceſtors were attainted, or baniſhed beyond ſea, for high treaſon; or were at the birth of ſuch children in the ſervice of a prince at enmity with great Britain (7). Yet the

[y] Stat. 29 Car. II. c. 6.
[z] 7 Rep. 18.
[a] Cro. Car. 601. Mar. 91. Jenk. Cent. 3.
[b] 7 Ann. c. 5. 4 Geo. II. c. 21. and 13 Geo. III. c. 21.

(7) All theſe exceptions to the common law, introduced by the legiſlature, are in caſes where the father or grandfather is a natural-born ſubject; but there is no proviſion made for the children born abroad of a mother, a natural-born ſubject, married to an alien. And in a late caſe, in which it was ſtated that the mo-

grandchildren of ſuch anceſtors ſhall not be privileged in reſpect of the alien's duty, except they be proteſtants, and actually reſide within the realm; nor ſhall be enabled to claim any eſtate or intereſt, unleſs the claim be made within five years after the ſame ſhall accrue.

THE children of aliens, born here in England, are, generally ſpeaking, natural-born ſubjects(8), and entitled to all the
[374] privileges of ſuch. In which the conſtitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien [c] (9).

A DENIZEN is an alien born, but who has obtained *ex donatione regis* letters patent to make him an Engliſh ſubject: a high and incommunicable branch of the royal prerogative [d]. A denizen is in a kind of middle ſtate, between an alien and natural-born ſubject, and partakes of both of them. He may take lands by purchaſe or deviſe, which an alien may not; but cannot take by inheritance [e]: for his parent, through whom he muſt claim, being an alien, had no inheritable blood; and therefore could convey none to the ſon (10). And, upon a

[c] Jenk. Cent. 3. cites *tractatus fran-gois.* 312.

[d] 7 Rep. Calvin's caſe. 25.

[e] 11 Rep. 67.

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ther of the plaintiff was an Engliſh woman, who married a ſubject of France, and had a ſon born to him in France, it was decided that that ſon could not inherit his mother's lands in England. Count Duroure *v.* Jones, 4 *T. R.* 300.

(8) Unleſs the alien parents are acting in the realm as enemies; for my lord Coke ſays, it is not *ſolum nec ſolum*, but their being born within the allegiance, and under the protection of the king. 7 *Co.* 18. *a.*

(9) The preſent learned Vinerian profeſſor informs us, that "in this reſpect there is not any difference between our laws and "thoſe of France. In each country birth confers the right of "naturalization." 1 *Woodd.* 386.

(10) By the 11 & 12 W. III. c. 6. natural-born ſubjects may derive a title by deſcent through their parents or any anceſtor, though they are aliens. But by 25 Geo. II. c. 39. this reſtriction is ſuperadded, *viz.* that no natural-born ſubject ſhall derive a title

like defect of hereditary blood, the iſſue of a denizen, born *before* denization, cannot inherit to him; but his iſſue born *after*, may [f]. A denizen is not excuſed [g] from paying the alien's duty, and ſome other mercantile burthens. And no denizen can be of the privy council, or either houſe of parliament, or have any office of truſt, civil or military, or be capable of any grant of lands, &c. from the crown [h].

NATURALIZATION cannot be performed but by act of parliament: for by this an alien is put in exactly the ſame ſtate as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, *&c.* [i] (11). No bill for naturalization can be received in either houſe of parliament, without ſuch diſabling clauſe in it [j]: nor without a clauſe diſabling the perſon from obtaining any immunity in trade thereby, in any foreign country; unleſs he ſhall have reſided in Britain for ſeven years next after the commencement of the ſeſſion in which he is naturalized [k]. Neither can any perſon be naturalized or reſtored in blood, unleſs he hath received the ſacrament of the lord's ſupper within one month before the bringing in of the bill; and unleſs he alſo takes the oaths of allegiance and ſupremacy in the preſence of the parliament [l]. But theſe proviſions have been uſually diſpenſed with by ſpecial acts of parliament,

[f] Co. Litt. 8. Vaugh. 285.
[g] Stat. 22 Hen. VIII. c. 8.
[h] Stat. 12 W. III. c. 2.
[i] *Ibid.*
[j] Stat. 1 Geo. I. c. 4.
[k] Stat. 14 Geo. III. c. 84.
[l] Stat. 7 Jac. I. c. 2.

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a title through an alien parent or anceſtor, unleſs he be born at the time of the death of the anceſtor who dies ſeiſed of the eſtate which he claims by deſcent, with this exception, that if a deſcent ſhall be caſt upon a daughter of an alien, it ſhall be veſted in favour of an after-born ſon; and in caſe of an after-born daughter or daughters only, all the ſiſters ſhall be coparceners.

(11) This ſtatute 12 W. III. c. 2. was paſſed from a jealouſy of king William's partiality to foreigners.

previous to bills of naturalization of any foreign princes or princeſſes [m].

[375] THESE are the principal diſtinctions between aliens, denizens, and natives: diſtinctions, which it hath been frequently endeavoured ſince the commencement of this century to lay almoſt totally aſide, by one general naturalization-act for all foreign proteſtants. An attempt which was once carried into execution by the ſtatute 7 Ann. c. 5. but this, after three years experience of it, was repealed by the ſtatute 10 Ann. c. 5. except one clauſe, which was juſt now mentioned, for naturalizing the children of Engliſh parents born abroad. However, every foreign ſeaman, who in time of war ſerves two years on board an Engliſh ſhip by virtue of the king's proclamation, is *ipſo facto* naturalized under the like reſtrictions as in ſtatute 12 W. III. c. 2. [n]; and all foreign proteſtants, and Jews, upon their reſiding ſeven years in any of the American colonies, without being abſent above two months at a time, and all foreign proteſtants ſerving two years in a military capacity there, or being three years employed in the whale fiſhery, without afterward abſenting themſelves from the king's dominions for more than one year, and none of them falling within the incapacities declared by ſtatute 4 Geo. II. c. 21. ſhall be (upon taking the oaths of allegiance and abjuration, or in ſome caſes, an affirmation to the ſame effect) naturalized to all intents and purpoſes, as if they had been born in this kingdom; except as to ſitting in parliament or in the privy council, and holding offices or grants of lands, *&c.* from the crown within the kingdoms of Great Britain or Ireland [o]. They therefore are admiſſible to all other privileges, which proteſtants or Jews born in this kingdom are entitled to. What thoſe privileges

[m] Stat. 4 Ann. c. 1. 7 Geo. II. c. 3. 9 Geo. II. c. 24. 4 Geo. III. c. 4.

[n] Stat. 13 Geo. II. c. 3.

[o] Stat. 13 Geo. II. c. 7. 20 Geo. II. c. 44. 22 Geo. II. c. 45. 2 Geo. III. c. 25. 13 Geo. III. c. 25.

are, with reſpect to Jews [p] in particular, was the ſubject of very high debates about the time of the famous Jew-bill [q]; which enables all Jews to prefer bills of naturalization in parliament, without receiving the ſacrament, as ordained by ſtatute 7 Jac. I. It is not my intention to revive this controverſy again; for the act lived only a few months, and was then repealed [r]: therefore peace be now to it's *manes*.

[p] A pretty accurate account of the Jews till their baniſhment in 8 Edw. I. may be found in Prynne's *demurrer*, and in Molloy *de jure maritimo*. b. 3. c. 6.

[q] Stat. 26 Geo. II. c. 26.

[r] Stat. 27 Geo. II. c. 1.

CHAPTER THE ELEVENTH.

OF THE CLERGY.

THE people, whether aliens, denizens, or natural-born ſubjects, are diviſible into two kinds; the clergy and laity: the clergy, comprehending all perſons in holy orders, and in eccleſiaſtical offices, will be the ſubject of the following chapter.

THIS venerable body of men, being ſeparate and ſet apart from the reſt of the people, in order to attend the more cloſely to the ſervice of almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the reformation on account of the ill uſe which the popiſh clergy had endeavoured to make of them. For, the laws having exempted them from almoſt every perſonal duty, they attempted a total exemption from every ſecular tie. But it is obſerved by ſir Edward Coke [a], that, as the overflowing of waters doth many times make the river to loſe it's proper channel, ſo in times paſt eccleſiaſtical perſons, ſeeking to extend their liberties beyond their true bounds, either loſt or enjoyed not thoſe which of right belonged to them. The perſonal exemptions do indeed for the moſt part continue. A clergyman cannot be compelled to ſerve on a jury, nor to appear at a court-leet or view of frank-pledge; which almoſt every other perſon is obliged to do [b]: but if a layman is
[377] ſummoned on a jury, and before the trial takes orders, he ſhall notwithſtanding appear and be ſworn [c]. Neither can he be

[a] 2 Inſt. 4. [b] F. N. B. 160. 2 Inſt. 4. [c] 4 Leon. 190.

choſen

chosen to any temporal office; as bailiff, reeve, constable, or the like: in regard of his own continual attendance on the sacred function [d]. During his attendance on divine service he is privileged from arrests in civil suits [e] (1). In cases also of felony, a clerk in orders shall have the benefit of his clergy, without being branded in the hand; and may likewise have it more than once (2): in both which particulars he is distinguished from a layman [f]. But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen [g], are incapable of sitting in the house of commons (3); and by statute 21 Hen. VIII. c. 13. are not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l.* *per* month, and total avoidance of the lease (4); nor upon like pain to keep any tanhouse or brewhouse (5); nor shall engage

[d] Finch. L. 88.
[e] Stat. 50 Edw. III. c. 5. 1 Ric. II. c. 16.
[f] 2 Inst. 637. Stat. 4 Hen. VII. c. 13. & 1 Edw. VI. c. 12.
[g] page 175.

(1) That is, for a reasonable time, *eundo, redeundo, et morando*, to perform divine service. 12 *Co.* 100.

(2) This is a peculiar privilege of the clergy, that sentence of death can never be past upon them for any number of manslaughters, bigamies, simple larcenies, or other clergyable offences; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death upon a second conviction of a clergyable offence; for if a layman has once been convicted of manslaughter, upon production of the conviction he may afterwards suffer death for bigamy, or any other felony, within clergy, or which would not be a capital crime to another person not so circumstanced. But for the honour of the clergy, there are few or no instances in which they have had occasion to claim the benefit of this privilege. See 4 vol. c. 28.

(3) See the Editor's reasons for the capacity of the clergy to sit in the house of commons in note 37 to Ch. II.

(4) But if they have not sufficient glebe, they may take a farm for the necessary expences and consumption of their households. 21 *Hen. VIII. c.* 13. *f.* 8.

(5) The singular prohibition to keep a tanhouse probably originated from a practice peculiar to the time.

in any manner of trade, nor ſell any merchandize, under forfeiture of the treble value (6) Which prohibition is conſonant to the canon law.

IN the frame and conſtitution of eccleſiaſtical polity there are divers ranks and degrees: which I ſhall conſider in their reſpective order, merely as they are taken notice of by the ſecular laws of England; without intermeddling with the canons and conſtitutions, by which the clergy have bound themſelves. And under each diviſion I ſhall conſider, 1. The method of their appointment; 2. Their rights and duties; and 3. The manner wherein their character or office may ceaſe.

I. AN arch-biſhop or biſhop is elected by the chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the uſual mode of elevation to the epiſcopal chair throughout all chriſtendom; and this was promiſcuouſly performed by the laity as well as the clergy [h]: till at length it becoming tumultuous, the emperors and other ſovereigns of the reſpective kingdoms of Eu- [378] rope took the appointment in ſome degree into their own hands; by reſerving to themſelves the right of confirming theſe elections, and of granting inveſtiture of the temporalties, which now began almoſt univerſally to be annexed to this ſpiritual dignity; without which confirmation and inveſtiture, the elected biſhop could neither be conſecrated nor receive any ſecular profits. This right was acknowleged in the emperor Charlemagne, *A. D.* 773, by Pope Hadrian I, and the council of Lateran [i], and univerſally exerciſed by other chriſtian princes: but the policy of the court of Rome at the ſame time began by degrees to exclude the laity from

[h] *per clerum et populum.* Palm. 25. 2 Roll. Rep. 102. M. Paris. *A. D.* 1095.
[i] *Decret.* 1 *diſt.* 63. c. 22.

(6) Though a clergyman is ſubject to this penalty for trading, yet his contracts are valid, and he is liable to be made a bankrupt. *Cooke, Bankr.* 33.

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any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprieks is said to have been in the crown of England [k] (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures; which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier: pretending, that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII, towards the close of the eleventh century, published a bulle of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them [m]. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalties, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while it's other pretensions [n]. [379]

[k] Palm. 28.

[l] "*Nulla electio prælatorum (sunt* "*verba Ingulphi) erat mere libera et* "*canonica; sed omnes dignitates tam* "*episcoporum, quam abbatum, per an-* "*nulum et baculum regis curia pro* "*sua complacentia confrebat.*" *Penes clericos et monachos fuit electio, sed electum a rege postulabant.* Selden. *Jan. Ang.* l. 1. § 39.

[m] *Decret.* 2. *cauf.* 16. *qu.* 7. *c.* 12. & 13.

[n] Mod. Un. Hist. xxv. 363. xxix. 115.

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This conceſſion was obtained from king Henry the firſt in England, by means of that obſtinate and arrogant prelate, arch-biſhop Anſelm [o]: but king John (about a century afterwards) in order to obtain the protection of the pope againſt his diſcontented barons, was alſo prevailed upon to give up by a charter, to all the monaſteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or biſhops: reſerving only to the crown the cuſtody of the temporalties during the vacancy; the form of granting a licence to elect, (which is the original of *our conge d' eſſire*) on refuſal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reaſonable and lawful cauſe [p]. This grant was expreſsly recognized and confirmed in king John's *magna carta* [q], and was again eſtabliſhed by ſtatute 25 Edw. III. ſt. 6. § 3.

But by ſtatute 25 Hen. VIII. c. 20. the antient right of nomination was, in effect, reſtored to the crown (7): it being enacted that, at every future avoidance of a biſhoprick, the king may ſend the dean and chapter his uſual licence to proceed to election; which is always to be accompanied with a letter miſſive from the king, containing the name of the perſon whom he would have them elect: and, if the dean and

[o] M. Paris. *A. D.* 1107.
[p] M. Paris. *A. D.* 1214. 1 Rym. *Fœd.* 198.
[q] *cap.* 1. *edit. Oxon.* 1759.

(7) This ſtatute was afterwards repealed by 1 Edw. VI. c. 2. which enacted that all biſhopricks ſhould be donative as formerly. It ſtates in the preamble that theſe elections are in very deed no elections; but only by a writ of *conge d'elire* have colours, ſhadows, or pretences of election, 1 *Burn. Ec. L.* 183. This is certainly good ſenſe. For the permiſſion to elect where there is no power to reject can hardly be reconciled with the freedom of election. But this ſtatute was afterwards repealed by 1 Ma. ſt. 2. c. 20. and other ſtatutes. 12 *Co.* 7. But the biſhopricks of the new foundation were always donative. *Harg. Co. Litt.* 134. As alſo are all the Iriſh biſhopricks by the 2 Eliz. c. 4. *Iriſh Statutes.*

chapter

chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the arch-bishop of the province; if it be of an arch-bishop, to the other arch-bishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only (8). And if such dean and chapter do not elect in the manner by this act appointed, or if such arch-bishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *praemunire* (9).

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(8) It is a prevailing vulgar error, that every bishop, before he accepts the bishoprick which is offered him, affects a maiden coyness and answers *nolo episcopari*. The origin of these words and this notion I have not been able to discover; the bishops certainly give no such refusal at present, and I am inclined to think they never did at any time in this country.

(9) It is directed in the form of consecrating bishops, confirmed by various statutes since the reformation, that a bishop when consecrated must be full thirty years of age. There seems to have been no restriction of this kind in ancient times; for bishop Godwin informs us, that George Nevile, the brother of the earl of Warwick the king-maker, was chancellor of Oxford, *et in episcopum Exoniensem consecratus est anno* 1455, *nondum annos natus viginti. Anno deinde* 1460 *(id quod jure mirere) summus Angliæ factus est cancellarius.* A few years afterwards he was translated to the archbishoprick of York. *Hoc sedente episcopus Sancti Andreæ in Scotiâ, archiepiscopus per Sixtum quartum creatus est, jussis illi duodecim episcopis illius gentis subesse, qui hactenus archiepiscopi Eboracensis suffraganei censebantur. Reclamante quidem Eboracensi, sed frustra; asserente pontifice, minimè convenire, ut ille Scotiæ sit metropolitanus, qui propter crebra inter Scotos ac Anglos bella. Scotis plerumque hostis sit capitalis.* Godw. Comm. de Præsul. 693.

AN arch-biſhop is the chief of the clergy in a whole province; and has the inſpection of the biſhops of that province, as well as of the inferior clergy, and may deprive them on notorious cauſe[r] (10). The arch-biſhop has alſo his own dioceſe, wherein he exerciſes epiſcopal juriſdiction; as in his province he exercifes archiepiſcopal. As arch-biſhop, he, upon receipt of the king's writ, calls the biſhops and clergy of his province to meet in convocation: but without the king's writ he cannot aſſemble them[s]. To him all appeals are made from inferior juriſdictions within his province; and, as an appeal lies from the biſhops in perſon to him in perſon, ſo it alſo lies from the conſiſtory courts of each dioceſe to his archiepiſcopal court. During the vacancy of any ſee in his province, he is guardian of the ſpiritualties thereof, as the king is of the temporalties; and he executes all eccleſiaſtical juriſdiction therein. If an archiepiſcopal ſee be vacant, the dean and chapter are the ſpiritual guardians, ever ſince the office of prior of Canterbury was aboliſhed at the reformation[t]. The arch biſhop is entitled to preſent by lapſe to all the eccleſiaſtical livings in the diſpoſal of his
[381] dioceſan biſhops, if not filled within ſix months. And the arch-biſhop has a cuſtomary prerogative, when a biſhop is conſecrated by him, to name a clerk or chaplain of his own to be provided for by ſuch ſuffragan biſhop; in lieu of which it is now uſual for the biſhop to make over by deed to the arch-biſhop, his executors and aſſigns, the next preſentation of ſuch dignity or benefice in the biſhop's diſpoſal within that fee, as the arch-biſhop himſelf ſhall chooſe; which is therefore called his *option*[u]: which options are only bind-

[r] Lord Raym. 541.
[s] 4 Inſt. 322, 323.
[t] 2 Roll. Abr. 22.
[u] Cowel's interp. tit. *option*.

(10) In the 11 W. III. the biſhop of St. David's was deprived for ſimony, and other offences, in a court held at Lambeth before the arch-biſhop, who called to his aſſiſtance ſix other biſhops. The biſhop of St. David's appealed to the delegates, who affirmed the ſentence of the arch-biſhop; and after ſeveral fruitleſs applications to the court of king's bench and the houſe of lords, he was at laſt obliged to ſubmit to the judgment. *Lord Ray.* 541. 1 *Burn. Ec. L.* 212.

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ing on the biſhop himſelf who grants them, and not on his ſucceſſors (11). The prerogative itſelf ſeems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury [w]. And we may add, that the papal claim itſelf (like moſt others of that encroaching ſee) was probably ſet up in imitation of the imperial prerogative called *primae* or *primariae preces*; whereby the emperor exerciſes, and hath immemorially exerciſed [x], a right of naming to the firſt prebend that becomes vacant after his acceſſion in every church of the empire [y]. A right, that was alſo exerciſed by the crown of England in the reign of Edward I [z]; and which probably gave riſe to the royal corodies which were mentioned in a former chapter [a]. It is likewiſe the privilege, by cuſtom, of the arch-biſhop of Canterbury, to crown the kings and queens of this kingdom (12). And he hath alſo

[w] Sherlock of options. 1.

[x] Goldaſt. *conſtit. imper. tom.* 3. *page* 406.

[y] Dufreſne. V. 806. Mod. Univ. Hiſt. xxix. 5.

[z] *Rex, &c. ſalutem. Scribatis epiſcopo Karl quod—Roberto de Icard penſionem ſuam, quam ad preces regis praedicto Roberto conceſſit, de caetero ſolvat; et de proxima eccleſia vacatura de collatione praedicti epiſcopi, quam ipſe Robertus acceptaverit, reſpiciat. Brev.* 11 Edw. I. 3 Pryn. 1264.

[a] ch. 8. page 284.

(11) The conſequence is, that the arch-biſhop never can have more than one option at once from the ſame dioceſe. Theſe options become the private patronage of the arch-biſhop, and upon his death are tranſmitted to his perſonal repreſentatives; or the arch-biſhop may direct by his will, whom, upon a vacancy, his executor ſhall preſent; which direction, according to a deciſion in the houſe of lords, his executor is compellable to obſerve. 1 *Burn. Ec. L.* 226. If a biſhop dies during the vacancy of any benefice within his patronage, the preſentation devolves to the crown; ſo likewiſe if a biſhop dies after an option becomes vacant, and before the arch-biſhop or his repreſentative has preſented, and the clerk is inſtituted, the crown *pro hac vice* will be entitled to preſent to that dignity or benefice. *Amb.* 101. For the grant of the option by the biſhop to the arch-biſhop has no efficacy beyond the life of the biſhop.

(12) It is ſaid that the arch-biſhop of York has the privilege to crown the queen-conſort, and to be her perpetual chaplain. 1 *Burn. Ec. L.* 178.

by the ſtatute 25 Hen. VIII. c. 21. the power of granting diſpenſations in any caſe, not contrary to the holy ſcriptures and the law of God, where the pope uſed formerly to grant them: which is the foundation of his granting ſpecial licenſes, to marry at any place or time, to hold two livings, and the like (13): and on this alſo is founded the right he exerciſes of conferring degrees (14), in prejudice of the two univerſities [b].

[382] THE power and authority of a biſhop, beſides the adminiſtration of certain holy ordinances peculiar to that ſacred order, conſiſt principally in inſpecting the manners of the people and clergy, and puniſhing them in order to reformation, by eccleſiaſtical cenſures. To this purpoſe he has ſeveral courts under him, and may viſit at pleaſure every part of his dioceſe. His chancellor is appointed to hold his courts for him, and to aſſiſt him in matters of eccleſiaſtical law; who, as well as all other eccleſiaſtical officers, if lay or married, muſt be a doctor of the civil law, ſo created in ſome univerſity [c]. It is alſo the buſineſs of a biſhop to inſtitute,

[b] See the biſhop of Cheſter's caſe. Oxon. 1721. [c] Stat. 37 Hen. VIII. c. 17.

(13) When the dominion of the pope was overturned in this country, this prerogative of diſpenſing with the canons of the church was transferred by that ſtatute to the arch-biſhop of Canterbury in all caſes in which diſpenſations were accuſtomed to be obtained at Rome; but in caſes unaccuſtomed, the matter ſhall be referred to the king and council. The pope could have diſpenſed with every eccleſiaſtical canon and ordinance. But in ſome of the caſes where the arch-biſhop alone has authority to diſpenſe, his diſpenſation with the canon, as to hold two livings, muſt be confirmed under the great ſeal.

(14) But although the arch-biſhop can confer all the degrees which are taken in the univerſities, yet the graduates of the two univerſities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree: as, for inſtance, thoſe degrees which are a qualification for a diſpenſation to hold two livings, are confined by 21 Hen. VIII. c. 13. ſ. 23. to the two univerſities.

and

and to direct induction, to all ecclesiastical livings in his diocese.

ARCHBISHOPRICKS and bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior [d]. Therefore a bishop must resign to his metropolitan; but the arch-bishop can resign to none but the king himself (15).

II. A DEAN and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see [e]. When the rest of the clergy were settled in the several parishes of each diocese, (as hath formerly [f] been mentioned,) these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend *ten* canons or prebendaries.

ALL antient deans are elected by the chapter, by *congé d' eslire* from the king, and letters missive of recommendation; in the same manner as bishops (16) but in those chapters, that were founded by Henry VIII out of the spoils of the dissolved monasteries (17), the deanery is donative, and the installation

[d] Gibs. cod. 822. [e] 3 Rep. 75. Co. Litt. 103. 300. [f] page 113, 114.

(15) The following are some of the popular distinctions between arch-bishops and bishops. The arch-bishops have the titles and style of *grace*, and *most reverend father in God by divine providence*; the bishops those of *lord*, and *right reverend father in God by divine permission*. Arch-bishops are inthroned, *inthronizati*; bishops installed.

(16) See a very learned note, containing a full history of the election, presentation, or donation to deaneries, by Mr. Hargrave in Co. Litt. 95.

(17) The new deaneries and chapters to old bishopricks are eight, viz. Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle; and five new bishopricks

merely by the king's letters patent[g]. The chapter, conſiſting of canons or prebendaries, are ſometimes appointed by the king, ſometimes by the biſhop, and ſometimes elected by each other.

The dean and chapter are, as was before obſerved, the nominal electors of a biſhop. The biſhop is their ordinary (18) and immediate ſuperior; and has, generally ſpeaking, the power of viſiting them, and correcting their exceſſes and enormities. They had alſo a check on the biſhop at common law: for till the ſtatute 32 Hen. VIII. c. 28. his grant or leaſe would not have bound his ſucceſſors, unleſs confirmed by the dean and chapter[h].

Deaneries and prebends may become void, like a biſhoprick, by death, by deprivation, or by reſignation to either the king or the biſhop[i]. Alſo I may here mention, once for all, that if a dean, prebendary, or other ſpiritual perſon be made a biſhop, all the preferments of which he was before poſſeſſed are void; and the king may preſent to them in right of his prerogative royal. But they are not void by the election, but only by the conſecration[j].

III. An arch-deacon hath an eccleſiaſtical juriſdiction, immediately ſubordinate to the biſhop, throughout the whole of his dioceſe, or in ſome particular part of it. He is uſually appointed by the biſhop himſelf; and hath a kind of epiſcopal authority, originally derived from the biſhop, but now independent and diſtinct from his[k]. He therefore viſits the

[g] Gibſ. cod. 173.
[h] Co. Litt. 103.
[i] Plowd. 498.
[j] Bro. *Abr. t. preſentation.* 3. 61.
Cro. Eliz. 542. 790. 2 Roll. Abr. 352. 4 Mod. 200. Salk. 137.
[k] 1 Burn. eccl. law. 68, 69.

with new deaneries and chapters annexed were created, *viz.* Peterborough, Cheſter, Glouceſter, Briſtol, and Oxford. *Harg. Co. Litt.* 95. n. 3.

(18) The biſhop is generally called the ordinary, but *the ordinary* has a more extenſive ſignification, as it includes every eccleſiaſtical judge who has the regular *ordinary* juriſdiction independent of another. 1 *Burn. Ec. L.* 22. *Co. Litt.* 344.

clergy;

clergy; and has his ſeparate court for puniſhment of offenders by ſpiritual cenſures, and for hearing all other cauſes of eccleſiaſtical cognizance.

IV. THE rural deans are very ancient officers of the church[l], but almoſt grown out of uſe; though their deaneries ſtill ſubſiſt as an eccleſiaſtical diviſion of the dioceſe, or archdeaconry. They ſeem to have been deputies of the [384] biſhop, planted all round his dioceſe, the better to inſpect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority [m].

V. THE next, and indeed the moſt numerous, order of men, in the ſyſtem of eccleſiaſtical polity, are the parſons and vicars of churches: in treating of whom I ſhall firſt mark out the diſtinction between them; ſhall next obſerve the method by which one may become a parſon or vicar; ſhall then briefly touch upon their rights and duties; and ſhall, laſtly, ſhew how one may ceaſe to be either.

A PARSON, *perſona eccleſiae*, is one that hath full poſſeſſion of all the rights of a parochial church. He is called parſon, *perſona*, becauſe by his perſon the church, which is an inviſible body, is repreſented; and he is in himſelf a body corporate, in order to protect and defend the rights of the church (which he perſonates) by a perpetual ſucceſſion [n]. He is ſometimes called the rector, or governor, of the church: but the appellation of *parſon* (however it may be depreciated by familiar, clowniſh, and indiſcriminate uſe) is the moſt legal, moſt beneficial, and moſt honourable title that a pariſh prieſt can enjoy; becauſe ſuch a one, (ſir Edward Coke obſerves,) and he only, is ſaid *vicem ſeu perſonam eccleſiae gerere*. A parſon has, during his life, the freehold in himſelf of the parſonage houſe, the glebe, the tithes, and other dues. But theſe are ſometimes *appropriated*; that is to ſay, the benefice is perpetually annexed to ſome ſpiritual corporation, either ſole or ag-

[l] Kennet. par. antiq. 633.
[m] Gibſ. cod. 972. 1550.
[n] Co. Litt. 300.

gregate, being the patron of the living; which the law eſteems equally capable of providing for the ſervice of the church, as any ſingle private clergyman. This contrivance ſeems to have ſprung from the policy of the monaſtic orders, who have never been deficient in ſubtile inventions for the increaſe of their own power and emoluments. At the firſt eſtabliſhment of parochial clergy, the tithes of the pariſh were diſtributed in a four-fold diviſion; one for the uſe of the biſhop, another for main-
[385] taining the fabrick of the church, a third for the poor, and the fourth to provide for the incumbent. When the ſees of the biſhops became otherwiſe amply endowed, they were prohibited from demanding their uſual ſhare of theſe tithes, and the diviſion was into three parts only. And hence it was inferred by the monaſteries, that a ſmall part was ſufficient for the officiating prieſt; and that the remainder might well be applied to the uſe of their own fraternities, (the endowment of which was conſtrued to be a work of the moſt exalted piety.) ſubject to the burthen of repairing the church and providing for it's conſtant ſupply. And therefore they begged and bought, for maſſes and obits, and ſometimes even for money, all the advowſons within their reach, and then appropriated the benefices to the uſe of their own corporation. But, in order to complete ſuch appropriation effectually, the king's licence, and conſent of the biſhop, muſt firſt be obtained: becauſe both the king and the biſhop may ſome time or other have an intereſt, by lapſe, in the preſentation to the benefice; which can never happen if it be appropriated to the uſe of a corporation, which never dies: and alſo becauſe the law repoſes a confidence in them, that they will not conſent to any thing that ſhall be to the prejudice of the church. The conſent of the patron alſo is neceſſarily implied: becauſe (as was before obſerved) the appropriation can be originally made to none, but to ſuch ſpiritual corporation, as is alſo the patron of the church; the whole being indeed nothing elſe, but an allowance for the patrons to retain the tithes and glebe in their own hands, without preſenting any clerk, they themſelves undertaking to provide for the ſervice of the church [o]. When the appropriation is thus made, the

[o] Plowd. 496—500.

appropriators and their ſucceſſors are perpetual parſons of the church; and muſt ſue and be ſued, in all matters concerning the rights of the church, by the name of parſons [p].

THIS appropriation may be ſevered, and the church become diſappropriate, two ways: as, firſt, if the patron or appropriator preſents a clerk, who is inſtituted and inducted to the parſonage: for the incumbent ſo inſtituted and inducted [386] is to all intents and purpoſes complete parſon; and the appropriation, being once ſevered, can never be re-united again, unleſs by a repetition of the ſame ſolemnities [q]. And, when the clerk ſo preſented (19) is diſtinct from the vicar, the rectory thus veſted in him becomes what is called a *fine-cure* (20); becauſe he hath no cure of ſouls, having a vicar under him to whom that cure is committed [r]. Alſo, if the corporation which has the appropriation is diſſolved, the parſonage becomes diſappropriate at common law; becauſe the perpetuity of perſon is gone, which is neceſſary to ſupport the appropriation.

IN this manner, and ſubject to theſe conditions, may appropriations be made at this day (21): and thus were moſt, if not

[p] Hob. 307.
[q] Co. Litt. 46.
[r] Sine-cures might alſo be created by other means. 2 Burn. eccl. law. 347.

(19) The editor conceives that there is no authority or reaſon to ſuppoſe, that the appropriator can thus create a ſinecure rector. But if the appropriator or impropriator ſhould, either by deſign or miſtake, preſent his clerk to the parſonage, it is held, that the vicarage will ever afterwards be diſſolved, and the incumbent will be entitled to all the tithes and dues of the church as rector. *Watſ.* c. 17. 2 *R. Ab.* 338.

(20) Wherever a rector and vicar are preſented and inſtituted to the ſame benefice, the rector is excuſed all duty, and has what is properly called a ſinecure. But where there is only one incumbent, the benefice is not in law a ſinecure, though there ſhould be neither a church nor any inhabitants within the pariſh.

(21) It ſurely may be queſtioned whether ſuch a power any longer exiſts; it cannot be ſuppoſed that, at this day, the inhabitants of a pariſh, who had been accuſtomed to pay their tithes to

all, of the appropriations at preſent exiſting originally made; being annexed to biſhopricks, prebends, religious houſes, nay even to nunneries, and certain military orders, all of which were ſpiritual corporations. At the diſſolution of monaſteries by ſtatutes 27 Hen. VIII. c. 28. and 31 Hen. VIII. c. 13. the appropriations of the ſeveral parſonages, which belonged to thoſe reſpective religious houſes, (amounting to more than one third of all the pariſhes in England [s],) would have been by the rules of the common law diſappropriated; had not a clauſe in thoſe ſtatutes intervened, to give them to the king in as ample a manner as the abbots, *&c.* formerly held the ſame, at the time of their diſſolution. This, though perhaps ſcarcely defenſible, was not without example; for the ſame was done in former reigns, when the alien priories (that is, ſuch as were filled by foreigners only) were diſſolved and given to the crown [t]. And from theſe two roots have ſprung all the lay appropriations or ſecular parſonages, which we now ſee in the kingdom; they having been afterwards granted out from time to time by the crown [u].

[387] THESE appropriating corporations, or religious houſes, were wont to depute one of their own body to perform divine

[s] Seld. review of tith. c. 9. Spelm. Apology. 35.

[t] 2 Inſt. 584.

[u] Sir H. Spelman (of tithes, c. 29.) ſays, theſe are now called impropriations, as being *improperly* in the hands of laymen.

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to their officiating miniſter, could be compelled to transfer them to an eccleſiaſtical corporation, to which they might perhaps be perfect ſtrangers. Appropriations are ſaid to have originated from an opinion inculcated by the monks, that tithes and oblations, though payable to ſome church, yet were an arbitrary diſpoſition of the donor, who might give them, as the reward of religious ſervice done to him, to any perſon whatever from whom he received that ſervice. 1 *Burn. Ec. L.* 63. And till they had got complete poſſeſſion of the revenues of the church, they ſpared no pains to recommend themſelves as the moſt deſerving objects of the gratitude and benefaction of the pariſh. There probably have been no new appropriations ſince the diſſolution of monaſteries,

ſervice,

ſervice, and adminiſter the ſacraments, in thoſe pariſhes of which the ſociety was thus the parſon. This officiating miniſter was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar*. His ſtipend was at the diſcretion of the appropriator, who was however bound of common right to find ſomebody, *qui illi de temporalibus, epiſcopo de ſpiritualibus, debeat reſpondere* [w]. But this was done in ſo ſcandalous a manner, and the pariſhes ſuffered ſo much by the neglect of the appropriators, that the legiſlature was forced to interpoſe: and accordingly it is enacted by ſtatute 15 Ric. II. c. 6. that in all appropriations of churches, the dioceſan biſhop ſhall ordain (in proportion to the value of the church) a competent ſum to be diſtributed among the poor pariſhioners annually; and that the vicarage ſhall be *ſufficiently* endowed. It ſeems the pariſhes were frequently ſufferers, not only by the want of divine ſervice, but alſo by withholding thoſe alms, for which, among other purpoſes, the payment of tithes was originally impoſed: and therefore in this act a penſion is directed to be diſtributed among the poor parochians, as well as a ſufficient ſtipend to the vicar. But he, being liable to be removed at the pleaſure of the appropriator, was not likely to inſiſt too rigidly on the legal ſufficiency of the ſtipend: and therefore by ſtatute 4 Hen. IV. c. 12. it is ordained, that the vicar ſhall be a ſecular perſon, not a member of any religious houſe; that he ſhall be vicar perpetual, not removeable at the caprice of the monaſtery; and that he ſhall be canonically inſtituted and inducted, and be ſufficiently endowed, at the diſcretion of the ordinary, for theſe three expreſs purpoſes, to do divine ſervice, to inform the people, and to keep hoſpitality (22). The endowments

[w] Seld. tith. c. 11. 1.

(22) From this act we may date the eſtabliſhment of vicarages; for before this time the vicar in general was nothing more than a temporary curate, and when the church was appropriated to a monaſtery, he was generally one of their own body, that is, one of the regular clergy; for the monks who lived *ſecundum regulas* of their reſpective

in conſequence of theſe ſtatutes have uſually been by a portion of the glebe, or land, belonging to the parſonage, and a particular ſhare of the tithes, which the appropriators found it
[388] moſt troubleſome to collect, and which are therefore generally called privy or ſmall tithes; the greater, or predial, tithes being ſtill reſerved to their own uſe. But one and the ſame rule was not obſerved in the endowment of all vicarages. Hence ſome are more liberally, and ſome more ſcantily, endowed: and hence the tithes of many things, as wood in particular, are in ſome pariſhes rectorial, and in ſome vicarial tithes.

THE diſtinction therefore of a parſon and vicar is this: the parſon has for the moſt part the whole right to all the eccleſiaſtical dues in his pariſh; but a vicar has generally an appropriator over him, entitled to the beſt part of the profits, to whom he is in effect perpetual curate, with a ſtanding ſalary (23). Though in ſome places the vicarage has been

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reſpective houſes or ſocieties, were denominated regular clergy, in contradiſtinction to the parochial clergy, who performed their miniſtry in the world *in ſeculo*, and who from thence were called ſecular clergy. All the tithes or dues of the church of common right belonged to the rector, or to the appropriator or impropriator, who have the ſame rights as the rector; and the vicar is entitled only to that portion which is expreſſed in his endowment, or what his predeceſſors have immemorially enjoyed by preſcription, which is equivalent to a grant or endowment. And where there is an endowment he may recover all that is contained in it; and he may ſtill retain what he and his predeceſſors have enjoyed by preſcription though not expreſſed in it; for ſuch a preſcription amounts to evidence of another conſiſtent endowment. Theſe endowments frequently inveſt the vicar with ſome part of the great tithes; therefore the words rectorial and vicarial tithes have no definite ſignification. But great and ſmall tithes are technical terms, and which are, or ought to be, accurately defined and diſtinguiſhed by the law.

(23) A vicar, from what has been advanced in the preceding page and note, muſt neceſſarily have an appropriator over him, or a ſinecure rector, who in ſome books is conſidered and called an appropriator. Of benefices, ſome have never been appropriated; conſequently in thoſe there can be no vicar, and the incumbent is rector,

conſiderably augmented by a large ſhare of the great tithes; which augmentations were greatly aſſiſted by the ſtatute 29 Car. II. c. 8. enacted in favour of poor vicars and curates, which rendered ſuch temporary augmentations (when made by the appropriators) perpetual.

THE method of becoming a parſon or vicar is much the ſame. To both there are four requiſites neceſſary: holy orders; preſentation; inſtitution; and induction. The method of conferring the holy orders of deacon and prieſt, according to the liturgy and canons[x], is foreign to the purpoſe of theſe commentaries; any farther than as they are neceſſary requiſites to make a complete parſon or vicar. By common law, a deacon, of any age, might be inſtituted and inducted to a parſonage or vicarage: but it was ordained by ſtatute 13 Eliz. c. 12. that no perſon under twenty-three years of age, and in deacon's orders, ſhould be preſented to any benefice with cure; and if he were not ordained prieſt within one year after his induction, he ſhould be *ipſo facto* deprived: and now, by ſtatute 13 & 14 Car. II. c. 4. no perſon is capable to be admitted to any benefice, unleſs he hath been firſt ordained a prieſt (24); and then he is, in the language of the law, a clerk in orders. But if he obtains orders, or a licence to preach, by money or

x See 2 Burn. eccl. law. 103.

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rector, and entitled to all the dues of the church. Some were appropriated to ſecular eccleſiaſtical corporations, which appropriations ſtill exiſt, except perhaps ſome few which may have been diſſolved; others were appropriated to the houſes of the regular clergy; all which appropriations, at the diſſolution of monaſteries, were transferred to the crown; and in the hands of the king or his grantees, are now called impropriations: but in ſome appropriated churches no perpetual vicar has ever been endowed; in that caſe the officiating miniſter is appointed by the appropriator or impropriator, and is called a perpetual curate.

(24) By canon 34, no one ſhall be admitted to the order of a deacon till he be twenty-three years old; and by that canon, and alſo by 13 Eliz. c. 12. no one can take the order of a prieſt till he be full four and twenty years old. 3 *Burn. Ec. L.* 27.

corrupt

corrupt practices (which ſeems to be the true, though not the common, notion of ſimony) the perſon giving ſuch orders forfeits[y] 40*l.* and the perſon receiving 10*l.* and is incapable of any eccleſiaſtical preferment for ſeven years afterwards.

ANY clerk may be preſented[z] to a parſonage or vicarage; that is, the patron, to whom the advowſon of the church belongs, may offer his clerk to the biſhop of the dioceſe to be inſtituted. Of advowſons, or the right of preſentation, being a ſpecies of private property, we ſhall find a more convenient place to treat in the ſecond part of theſe commentaries. But when a clerk is preſented, the biſhop may refuſe him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days[a]. Or, 2. If the clerk be unfit[b]: which unfitneſs is of ſeveral kinds. Firſt, with regard to his perſon; as if he be a baſtard (25), an outlaw, an excommunicate, an alien, under age, or the like[c]. Next, with regard to his faith or morals; as for any particular hereſy, or vice that is *malum in ſe:* but if the biſhop alleges only in generals, as that he is *ſchiſmaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like; it is not good cauſe of refuſal[d]. Or, laſtly, the clerk may be unfit to diſcharge the paſtoral office for want of learning. In any of which caſes the biſhop may refuſe the clerk. In caſe the refuſal is for hereſy, ſchiſm, inability of learning, or other matter of eccleſiaſtical cognizance, there the biſhop muſt give notice to the patron of ſuch his cauſe of refuſal, who, being uſually a layman, is not ſuppoſed to have knowlege

[y] Stat. 31 Eliz. c. 6.

[z] A layman may alſo be preſented; but he muſt take prieſt's orders before his admiſſion. 1 Burn. 103.

[a] 2 Roll. Abr. 355.

[b] Glanv. l. 13. c. 20.

[c] 2 Roll. Abr. 356. 2 Inſt. 632. Stat. 3 Ric. II. c. 3. 7 Ric. II. c. 12.

[d] 5 Rep. 58.

(25) Though this be claſſed in the books among the cauſes of refuſal, yet ſuch is the liberality of the preſent times, that no one need apprehend that his preferment would be impeded by the incontinence of his parents, or by any demerit but his own.

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of it; elſe he cannot preſent by lapſe: but, if the cauſe be temporal, there he is not bound to give notice[e].

IF an action at law be brought by the patron againſt the [390] biſhop for refuſing his clerk, the biſhop muſt aſſign the cauſe. If the cauſe be of a temporal nature and the fact admitted, (as, for inſtance, outlawry,) the judges of the king's courts muſt determine it's validity, or, whether it be ſufficient cauſe of refuſal: but if the fact be denied, it muſt be determined by a jury. If the cauſe be of a ſpiritual nature, (as, hereſy, particularly alleged,) the fact if denied ſhall alſo be determined by a jury; and if the fact be admitted or found, the court upon conſultation and advice of learned divines ſhall decide it's ſufficiency[f]. If the cauſe be want of learning, the biſhop need not ſpecify in what points the clerk is deficient, but only allege that he is deficient[g]: for the ſtatute 9 Edw. II. ſt. 1. c. 13. is expreſs, that the examination of the fitneſs of a perſon preſented to a benefice belongs to the eccleſiaſtical judge. But becauſe it would be nugatory in this caſe to demand the reaſon of refuſal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore if the biſhop returns the clerk to be *minus ſufficiens in literatura*, the court ſhall write to the metropolitan, to re-examine him, and certify his qualifications; which certificate of the arch-biſhop is final[h].

IF the biſhop hath no objections, but admits the patron's preſentation, the clerk ſo admitted is next to be inſtituted by him; which is a kind of inveſtiture of the ſpiritual part of the benefice: for by inſtitution the care of the ſouls of the pariſh is committed to the charge of the clerk. When a vicar is inſtituted, he (beſides the uſual forms) takes, if required by the biſhop (26), an oath of perpetual reſidence; for the maxim of law is, that *vicarius non habet vicarium*: and, as the non-

[e] 2 Inſt. 632.
[f] 2 Inſt. 632.
[g] 5 Rep. 58. 3 Lev. 313.
[h] 2 Inſt. 632.

(26) It does not appear that the biſhop can diſpenſe with the vicar's oath, which is, that he will be reſident upon his vicarage, unleſs diſpenſed withal by his dioceſan. 1 *Burn. Ec. L.* 148.

reſidence of the appropriators was the cauſe of the perpetual eſtabliſhment of vicarages, the law judges it very improper for them to defeat the end of their conſtitution, and by abſence to create the very miſchief which they were appointed to remedy: eſpecially as, if any profits are to ariſe from putting in a curate and living at a diſtance from the pariſh, the appropriator, who is the real parſon, has undoubtedly the elder title to them. When the ordinary is alſo the patron, and *confers* the living, the preſentation and inſtitution are one and the ſame act, and are called a collation to a benefice. By inſtitution or collation the church is full, ſo that there can be no freſh preſentation till another vacancy, at leaſt in the caſe of a common patron; but the church is not full againſt the king, till induction: nay, even if a clerk is inſtituted upon the king's preſentation, the crown may revoke it before induction, and preſent another clerk [i]. Upon inſtitution alſo the clerk may enter on the parſonage houſe and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

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INDUCTION is performed by a mandate from the biſhop to the arch-deacon, who uſually iſſues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal poſſeſſion of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the pariſhioners due notice, and ſufficient certainty of their new miniſter, to whom their tithes are to be paid. This therefore is the inveſtiture of the temporal part of the benefice, as inſtitution is of the ſpiritual. And when a clerk is thus preſented, inſtituted, and inducted into a rectory, he is then, and not before, in full and complete poſſeſſion, and is called in law *perſona imperſonata*, or parſon imparſonee [k].

THE rights of a parſon or vicar, in his tithes and eccleſiaſtical dues, fall more properly under the ſecond book of theſe commentaries: and as to his duties, they are principally of eccleſiaſtical cognizance; thoſe only excepted which are laid

[i] Co. Litt. 344. [k] Co. Litt. 300.

upon

upon him by ſtatute. And thoſe are indeed ſo numerous, that it is impracticable to recite them here with any tolerable conciſeneſs or accuracy. Some of them we may remark, as they [392] ariſe in the progreſs of our inquiries, but for the reſt I muſt refer myſelf to ſuch authors as have compiled treatiſes expreſsly upon this ſubject [l]. I ſhall only juſt mention the article of reſidence, upon the ſuppoſition of which the law doth ſtile every parochial miniſter an incumbent. By ſtatute 21 Hen. VIII. c. 13. perſons wilfully (27) abſenting themſelves from their benefices, for one month together, or two months in the year, incur a penalty of 5 *l.* to the king, and 5 *l.* to any perſon that will ſue for the ſame (28): except chaplains to the king, or others therein mentioned [m], during their attendance in the houſhold of ſuch as retain them (29): and alſo except [n]

[l] Theſe are very numerous: but there are few which can be relied on with certainty. Among theſe are biſhop Gibſon's *codex*, Dr Burn's *eccleſiaſtical law*, and the earlier editions of the *clergyman's law*, publiſhed under the name of Dr Watſon, but compiled by Mr Place a barriſter.

[m] Stat. 25 Hen. VIII. c. 16. 33 Hen. VIII. c. 28.

[n] Stat. 28 Hen. VIII. c. 13.

(27) Ill health, or any inevitable abſence, is an exemption from the penalties of this ſtatute. *Gibſ. Cod.* 887.

(28) This ſtatute muſt be put in ſuit by a common informer within a year, or by the king within two years, after the end of that year; ſo that 12 penalties, or 120 *l.* may be recovered at once by a ſubject for himſelf and the king, or the king may recover at once 25 penalties, or 250 *l.* (See 4 vol. 308.) But, independent of this ſtatute, the biſhop in his court may compel the reſidence of all clergy, who have the cure or care of ſouls within his dioceſe. 3 *Burn. Ec.* 281. *Gibſ.* 887. This ſtatute is not confined to parſonages and vicarages, but extends to all archdeaconries, deanries, and dignities in cathedral and collegiate churches. Thoſe who have two benefices or dignities, upon each of which reſidence is required, muſt reſide upon one or the other. But it has lately been decided, that the incumbent of an augmented curacy cannot be proſecuted under the ſtatute for the penalties of non-reſidence. 4 *T. R.* 665.

(29) The king can give a licence to his chaplains for non-reſidence, even whilſt they do not attend his houſehold; but the chaplains of noblemen are only excuſed during their actual attendance upon their lords or ladies. 3 *Burn. Ec. L.* 290.

all heads of houſes, magiſtrates (30), and profeſſors in the univerſities, and all ſtudents under forty years of age reſiding there, *bona fide*, for ſtudy. Legal reſidence is not only in the pariſh, but alſo in the parſonage houſe, if there be one: for it hath been reſolved[o], that the ſtatute intended reſidence, not only for ſerving the cure, and for hoſpitality; but alſo for maintaining the houſe, that the ſucceſſor alſo may keep hoſpitality there: and, if there be no parſonage houſe, it hath been holden that the incumbent is bound to hire one, in the ſame or ſome neighbouring pariſh (31), to anſwer for the purpoſes of reſidence. For the more effectual promotion of which important duty among the parochial clergy, a proviſion is made by the ſtatute 17 Geo. III. c. 53. for raiſing money upon eccleſiaſtical benefices, to be paid off by annually decreaſing

[o] 6 Rep. 21.

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(30) Viz. the chancellor, vice-chancellor, commiſſary, doctors of the chair, (*i. e.* doctors who uſed to preſide in the public ſchools,) and readers of lectures; and under this deſcription only, can profeſſors claim an exemption from reſidence.

(31) It has been decided, by the court of king's bench, that even where there is no parſonage-houſe, the incumbent is bound to reſide within the pariſh. *Comp.* 429. If a clergyman had one benefice with a parſonage-houſe, and another benefice without a houſe, the Editor conceives that he is not bound to reſide in that pariſh in which there is a houſe, for more important duties may impel him to reſide within the pariſh where there is no houſe; and that ſuch reſidence would exempt him from the penalties of the ſtatute. But where the archdeacon of St. Alban's had the living of Buſhey within his archdeaconry, to which living there is a parſonage-houſe belonging, and he reſided in the pariſh of Buſhey, but not in the parſonage-houſe; it was held by the court of king's bench, that he was ſubject to the penalties of non-reſidence, though he was living within the limits of his archdeaconry, to which dignity there is no houſe appurtenant. *5 Burr.* 2722. If then the Editor's opinion be well founded, the deciſion muſt have been different, if he had reſided in any other part of his archdeaconry out of the pariſh of Buſhey.

inſtallments, and to be expended in rebuilding or repairing the houſes belonging to ſuch benefices (32).

WE have ſeen that there is but one way, whereby one may become a parſon or vicar: there are many ways, by which one may ceaſe to be ſo. 1. By death. 2. By ceſſion, in taking another benefice. For by ſtatute 21 Hen. VIII. c. 13. if any one having a benefice of 8*l. per annum*, or upwards, (according to the preſent valuation in the king's books [p],) accepts, any other, the firſt ſhall be adjudged void, unleſs he obtains a diſpenſation (33), which no one is intitled to have, but the

[p] Cro. Car. 456.

(32) This act enables the incumbent, when there is no parſonage-houſe, or where it is ſo ruinous as not to be repaired with one year's income of the living, to borrow, with the conſent of the patron and ordinary, upon mortgage of the revenue of the living, a ſum not exceeding two years clear value, to be laid out in repairs, building, or the purchaſe of a houſe. The intereſt of the money borrowed, is to be repaid by the incumbent yearly, and 5*l. per cent.* of the original ſum; or 10*l. per cent.* if he does not reſide twenty weeks within a year. And where the income is 100*l.* a year, and the incumbent does not reſide twenty weeks within a year, the patron and the ordinary are empowered to undertake this without his conſent. The governors of queen Anne's bounty may lend money upon ſuch mortgages, at 4*l. per cent.* intereſt; and 100*l.* upon a living under 40*l.* a year, without any intereſt. Colleges and other corporations may lend money for this purpoſe upon their own livings, without intereſt. For forms and mode of proceeding, conſult the ſtatute at large. It is very remarkable that, under this act, the money borrowed was directed to be diſcharged by paying 5*l. per cent.* yearly upon the principal remaining due; the conſequence was, that it would have been diminiſhed by decreaſing inſtallments, which would have produced an infinite ſeries, or the whole could never have been paid. And it required another act, the 21 Geo. III. c. 66. which was paſſed merely for the purpoſe, to correct this palpable blunder, by which ſtatute, the original ſum muſt be paid, as ſtated, at the fartheſt, within twenty years.

(33) But both the livings muſt have cure of ſouls; and the ſtatute expreſsly excepts deaneries, archdeaconries, chancellorſhips, treaſurerſhips, chanterſhips, prebends, and ſinecure rectories; a diſpenſation in this caſe can only be granted to hold one benefice

chaplains (34) of the king and others therein mentioned, the

more, except to clerks, who are of the privy-council, who may hold three by diſpenſation. By the canon law, no perſon can hold a ſecond incompatible benefice without a diſpenſation; and in that caſe, if the firſt is under 8 *l. per annum*, it is ſo far void that the patron may preſent another clerk, or the biſhop may deprive; but till deprivation, no advantage can be taken by lapſe. But independent of the ſtatute, a clergyman by diſpenſations may hold any number of benefices, if they are all under 8 *l. per annum*, except the laſt, and then, by a diſpenſation under the ſtatute, he may hold one more.

By the 41ſt canon of 1603, the two benefices muſt not be farther diſtant from each other than 30 miles, and the perſon obtaining the diſpenſation muſt at leaſt be a maſter of arts in one of the univerſities. But the proviſions of this canon are not enforced or regarded in the temporal courts. 2 *Black. Rep.* 968. See note 14. p. 83.

It had been doubted whether the ſtatute 1 Geo. I. ſt. 2. c. 10. which enacts that all churches, curacies, and chapels augmented by queen Anne's bounty ſhall become perpetual cures and benefices, had thereby brought them under the ſtatute of pluralities, ſo as to produce the avoidance of other livings. But to remove all doubts upon that ſubject the 36 Geo. III. c. 83. has declared that ſuch augmented churches and chapels ſhall be conſidered as preſentative benefices, and that the licence to them ſhall render other livings voidable in the ſame manner as inſtitution to preſentative benefices: but that every clergyman ſhould continue in quiet poſſeſſion of any benefices which he held in conjunction with ſuch augmented cures before the paſſing of that act, viz. 14th May 1796.

(34) The number of the chaplains of the king and royal family, who may have diſpenſations, is unlimited. An archbiſhop may have eight, a duke and biſhop ſix, a marquis and earl five, a viſcount four; the chancellor, a baron, and knight of the garter, three; a ducheſs, marchioneſs, counteſs, and baroneſs, being widows, two; the king's treaſurer, comptroller, ſecretary, dean of the chapel, amner, and the maſter of the rolls, two; the chief juſtice of king's bench, and warden of cinque ports, one. Theſe chaplains only can obtain a diſpenſation under the ſtatute.

If one perſon has two or more of theſe titles or characters united in himſelf, he can only retain the number of chaplains limited to his higheſt degree; and if a nobleman retain his full number of chaplains, no one of them can be diſcharged, ſo that another ſhall be appointed in his room during his life. 4 *Co.* 90. The king may preſent his own chaplains, *i. e.* waiting chaplains in ordinary,

brethren and the ſons of lords and knights (35), and doctors and bachelors of divinity and law (36), *admitted by the univerſities* of this realm. And a vacancy thus made, for want of a diſpenſation, is called ceſſion (37). 3. By conſecration; for, as was mentioned before, when a clerk is promoted to a biſhoprick, all [393] his other preferments are void the inſtant that he is conſecrated. But there is a method, by the favour of the crown, of holding ſuch livings *in commendam*. *Commenda*, or *eccleſia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper paſtor is provided for it. This may be temporary for one, two, or three years; or perpetual: being a kind of diſpenſation to avoid the vacancy of the living,

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to any number of livings in the gift of the crown, and even in addition to what they hold upon the preſentation of a ſubject without diſpenſation: but a king's chaplain being beneficed by the king, cannot afterwards take a living from a ſubject, but by a diſpenſation according to the ſtatute 21 Hen. VIII. c. 13. *f.* 29. 1 *Salk.* 161.

(35) This privilege is not enjoyed by the brother and ſon of a baronet, for the rank of baronet did not then exiſt.

(36) The words of the ſtatute are, "all doctors and bachelors of "divinity, doctors of laws, and bachelors of the law canon." Before the reformation, degrees were as frequent in the canon law as in the civil law. Many were graduates *in utroque jure*, or *utriuſque juris*. J. U. D. or *juris utriuſque doctor*, is ſtill common in foreign univerſities. But Hen. VIII. in the 27th year of his reign, when he had renounced the authority of the pope, iſſued a mandate to the univerſity of Cambridge, *ut nulla legatur palam et publice lectio in jure canonico ſive pontificio, nec aliquis cujuſcunque conditionis homo gradum aliquem in ſtudio illius juris pontificii ſuſcipiat, aut in eodem in poſterum promoveatur quovis modo.* Stat. Acad. Cant. p. 137. It is probable, that, at the ſame time, Oxford received a ſimilar prohibition, and that degrees in cannon law have ever ſince been diſcontinued in England.

(37) In the caſe of a ceſſion under the ſtatute, the church is ſo far void upon inſtitution to the ſecond living, that the patron may take notice of it, and preſent if he pleaſes: but there is great reaſon to think, that lapſe will not incur from the time of inſtitution againſt the patron, unleſs notice be given him; but lapſe will incur from the time of induction without notice. 2 *Wilſ.* 209. 3 *Burr.* 1504.

and is called a *commenda retinere* (38). There is also a *commenda recipere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk [q]. 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made [r] (39). 5 By deprivation, either, first, by sentence declaratory in the ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony [s], or conviction of other infamous crime in the king's courts; for heresy, infidelity [t], gross immorality, and the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malefeasance or crime; as, for simony [t]; for maintaining any doctrine in derogation

[q] Hob. 144.
[r] Cro. Jac. 198.
[s] Dyer. 108. Jenk. 210.
[t] Fitz. *Abr.* t. *Trial.* 54.
[t] Stat. 31 Eliz. c. 6. 12 Ann. c. 12.

(38) These commendams are now seldom or never granted to any but bishops; and in that case, the bishop is made commendatory of the benefice, while he continues bishop of such a diocese, as the object is to make it an addition to a small bishoprick; and it would be unreasonable to grant it to a bishop for his life, who might be translated afterwards to one of the richest sees. See an account of the proceedings in the great case of commendams, *Hob.* 140. and *Collier's Ec. Hist.* 2 vol. p. 710.

(39) It seems to be clear, that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the bishop of London and Fytche, the judges in general declined to answer whether a bishop was compellable to accept a resignation: one thought he was compellable by *mandamus*, if he did not shew sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishoprick, as no one can accept a bishoprick in Ireland till he has resigned all his benefices in England. But lord Thurlow seemed to be of opinion that he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error. See 3 *Burn*, 304. and the opinions of the judges in *Cunningham's Law of Simony*, though ill reported,

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of the king's ſupremacy, or of the thirty-nine articles, or of the book of common-prayer [v]; for neglecting after inſtitution to read the liturgy and articles in the church, or make the declarations againſt popery, or take the abjuration oath [u]; for uſing any other form of prayer than the liturgy of the church of England [w]; or for abſenting himſelf ſixty days in one year from a benefice belonging to a popiſh patron, to which the clerk was preſented by either of the univerſities [x]; in all which and ſimilar caſes [y] the benefice is *ipſo facto* void, without any formal ſentence of deprivation.

VI. A CURATE is the loweſt degree in the church; being in the ſame ſtate that a vicar was formerly, an officiating temporary miniſter, inſtead of the proper incumbent. Though there are what are called *perpetual* curacies, where all the [394] tithes are appropriated, and no vicarage endowed, (being for ſome particular reaſons [z] exempted from the ſtatute of Hen. IV.) but, inſtead thereof, ſuch perpetual curate is appointed by the appropriator. With regard to the other ſpecies of curates, they are the objects of ſome particular ſtatutes, which ordain, that ſuch as ſerve a church during it's vacancy ſhall be paid ſuch ſtipend as the ordinary thinks reaſonable, out of the profits of the vacancy; or, if that be not ſufficient, by the ſucceſſor within fourteen days after he takes poſſeſſion [a]; and that, if any rector or vicar nominates a curate to the ordinary to be licenſed to ſerve the cure in his abſence, the ordinary ſhall ſettle his ſtipend under his hand and ſeal, not exceeding 50 *l. per annum*, nor leſs than 20 *l.* and on failure of payment may ſequeſter the profits of the benefice [b] (40).

[v] Stat. 1 Eliz. c. 1 & 2. 13 Eliz. c. 12.
[u] Stat. 13 Eliz. c. 12. 14 Car. II. c. 4. 1 Geo. I. c. 6.
[w] Stat. 1 Eliz. c. 2.
[x] Stat. 1 W. & M. c. 26.
[y] 6 Rep. 29, 30.
[z] 1 Burn. eccl. law. 427.
[a] Stat. 28 Hen. VIII. c. 11.
[b] Stat. 12 Ann. ſt. 2. c. 12.

(40) It was provided in 1603, by canon 33, that if a biſhop ordains any perſon not provided with ſome eccleſiaſtical preferment, except a fellow or chaplain of a college, or a maſter of arts of five years ſtanding, who lives in the univerſity at his own expence, he ſhall ſupport him till he ſhall prefer him to a living. 3 *Burn. Ec. L.* 28. And the biſhops, before they confer orders, require either proof of ſuch a title as is deſcribed by the canon, or a cer-

THUS much of the clergy, properly ſo called. There are alſo certain inferior eccleſiaſtical officers of whom the common law takes notice; and that, principally, to aſſiſt the eccleſiaſtical juriſdiction, where it is deficient in powers. On which officers I ſhall make a few curſory remarks.

VII. CHURCHWARDENS are the guardians or keepers of the church, and repreſentatives of the body of the pariſh [c]. They are ſometimes appointed by the miniſter, ſometimes by

[c] In Sweden they have ſimilar officers, whom they call *kirchiowerandes*. Stiernhook. *l.* 3. *c.* 7.

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tificate from ſome rector or vicar, promiſing to employ the candidate for orders *bonâ fide* as a curate, and to grant him a certain allowance, till he obtains ſome eccleſiaſtical preferment, or ſhall be removed for ſome fault. And in a caſe where the rector of St. Ann's, Weſtminſter, gave ſuch a title, and afterwards diſmiſſed his curate without aſſigning any cauſe, the curate recovered, in an action of aſſumpſit, the ſame ſalary for the time after his diſmiſſion which he had received before. *Cowp.* 437. And when the rector had vacated St. Ann's, by accepting the living of Rochdale, the curate brought another action to recover his ſalary ſince the rector left St. Ann's; but lord Mansfield and the court held, that that action could not be maintained, and that theſe titles are only binding upon thoſe who give them, while they continue incumbents in the church for which ſuch curate is appointed. *Doug.* 137.

The 36 Geo. III. c. 83. has given a power to the biſhop or ordinary to grant an allowance not exceeding 75*l.* to any curate, who ſhall be *employed* by any rector or vicar, or by any curate or incumbent of any church or chapel, which has been augmented by queen Ann's bounty, or by the curate or incumbent of any perpetual curacy, although it has not been ſo augmented.

And where a rector or vicar does not reſide four months in the year at leaſt, the biſhop or ordinary may grant the uſe of the rectory or vicarage houſe with the garden and ſtable for one year to the curate for his actual reſidence in it. Or he may grant him 15*l.* a year in lieu of the rectory or vicarage houſe. The grant of the houſe he has power to renew, and at any time he may revoke it, and he may annex to it ſuch conditions as he ſhall think reaſonable. If the curate refuſes to give up poſſeſſion at the determination of the grant, he ſhall forfeit to his rector or vicar all the ſtipend, which ſhall be or become due to him, and 50*l.* beſides. And the ordinary has power to licence any curate, who ſhall be employed by any rector, vicar, or other incumbent of a pariſh church or chapel, although no nomination ſhall have been made to him for that purpoſe; or he may revoke his licence, or remove any curate for a reaſonable cauſe, but ſubject to an appeal to the archbiſhop of the province, to be determined in a ſummary manner.

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the pariſh, ſometimes by both together, as cuſtom directs. They are taken, in favour of the church, to be for ſome purpoſes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the uſe and profit of the pariſh. Yet they may not waſte the church goods, but may be removed by the pariſh, and then called to account by action at the common law; but there is no method of calling them to account, but by firſt removing them; for none can legally do it, but thoſe who are put in their place. As to lands, or other real property, as the church, church- [395] yard, &c. they have no ſort of intereſt therein; but if any damage is done thereto, the parſon only or vicar ſhall have the action. Their office alſo is to repair the church, and make rates and levies for that purpoſe: but theſe are recoverable only in the eccleſiaſtical court. They are alſo joined with the overſeers in the care and maintenance of the poor. They are to levy [d] a ſhilling forfeiture on all ſuch as do not repair to church on ſundays and holidays, and are empowered to keep all perſons orderly while there; to which end it has been held that a churchwarden may juſtify the pulling off a man's hat, without being guilty of either an aſſault or treſpaſs [e]. There are alſo a multitude of other petty parochial powers committed to their charge by divers acts of parliament [f].

VIII. PARISH clerks and ſextons are alſo regarded by the common law, as perſons who have freeholds in their offices; and therefore though they may be puniſhed, yet they cannot be deprived, by eccleſiaſtical cenſures [g]. The pariſh clerk was formerly very frequently in holy orders, and ſome are ſo to this day. He is generally appointed by the incumbent, but by cuſtom may be choſen by the inhabitants; and if ſuch cuſtom appears, the court of king's bench will grant a *mandamus* to the arch-deacon to ſwear him in, for the eſtabliſhment of the cuſtom turns it into a temporal or civil right [h].

[d] Stat. 1 Eliz. c. 2.

[e] 1 Lev. 196.

[f] See Lambard of churchwardens, at the end of his *eirenarcha*; and Dr Burn, tit. *church, churchwardens, viſitations.*

[g] 2 Roll. Abr. 234.

[h] Cro. Car. 589.

CHAPTER THE TWELFTH.

OF THE CIVIL STATE.

THE lay part of his majeſty's ſubjects, or ſuch of the people as are not comprehended under the denomination of clergy, may be divided into three diſtinct ſtates, the civil, the military, and the maritime.

THAT part of the nation which falls under our firſt and moſt comprehenſive diviſion, the civil ſtate, includes all orders of men from the higheſt nobleman to the meaneſt peaſant, that are not included under either our former diviſion, of clergy, or under one of the two latter, the military and maritime ſtates: and it may ſometimes include individuals of the other three orders; ſince a nobleman, a knight, a gentleman, or a peaſant, may become either a divine, a ſoldier, or a ſeaman.

THE civil ſtate conſiſts of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the biſhops) one of the ſupreme branches of the legiſlature, I have before ſufficiently ſpoken: we are here to conſider them according to their ſeveral degrees, or titles of honour.

ALL degrees of nobility and honour are derived from the king as their fountain[a]: and he may inſtitute what new titles he pleaſes. Hence it is that all degrees of nobility are not of equal antiquity. Thoſe now in uſe are dukes, marqueſſes, earls, viſcounts, and barons[b].

1. A *duke*, though he be with us, in reſpect of his title of nobility, inferior in point of antiquity to many others, yet is ſuperior to all of them in rank; his being the firſt

[a] 4 Inſt. 363.

[b] For the original of theſe titles on the continent of Europe, and their ſubſequent introduction into this iſland, ſee Mr Selden's *titles of honour*.

title

title of dignity after the royal family [c]. Among the Saxons the Latin name of dukes, *duces*, is very frequent, and ſignified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called heretoza [d]; and in the laws of Henry I (as tranſlated by Lambard) we find them called *heretochii*. But after the Norman conqueſt, which changed the military polity of the nation, the kings themſelves continuing for many generations *dukes* of Normandy, they would not honour any ſubjects with the title of duke, till the time of Edward III; who, claiming to be king of France, and thereby loſing the ducal in the royal dignity (1), in the eleventh year of his reign created his ſon, Edward the black prince, duke of Cornwall: and many, of the royal family eſpecially, were afterwards raiſed to the like honour. However, in the reign of queen Elizabeth, *A. D.* 1572 [e], the whole order became utterly extinct; but it was revived about fifty years afterwards by her ſucceſſor, who was remarkably prodigal of honours, in the perſon of George Villiers duke of Buckingham.

2. A *marqueſs*, *marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never ſeparated by our anceſtors) to guard the frontiers and limits of the kingdom; which were called the marches, from the teutonic word, *marche*, a limit: ſuch as, in particular, were the marches of Wales and Scotland, while each continued to be an ene-

[c] Camden. Britan. *tit. ordines.*

[d] This is apparently derived from the ſame root as the German herzog, the antient appellation of dukes in that country. Seld. tit. hon. 2. 1. 12.

[e] Camden. Britan. *tit. ordines.* Spelman. *Gloſſ.* 191.

(1) This reaſon is not very ſatisfactory, and, in fact, this order of nobility was created before Edward aſſumed the title of king of France. Dr. Henry, in his excellent Hiſtory of England, informs us, that "about a year before Edward III. aſſumed the "title of king of France, he introduced a new order of nobility, "to inflame the military ardour and ambition of his earls and "barons, by creating his eldeſt ſon prince Edward duke of "Cornwall. This was done with great ſolemnity in full parlia-"ment at Weſtminſter, March 17, *A. D.* 1337." *Hen. Hiſt.* 8 vol. 135. 8vo. edition. See *ante*, p. 224, note 10.

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my's country. The perſons, who had command there, were called lords marchers, or marqueſſes; whoſe authority was aboliſhed by ſtatute 27 Hen. VIII. c. 27: though the title had long before been made a mere enſign of honour; Robert Vere, earl of Oxford, being created marqueſs of Dublin, by Richard II in the eighth year of his reign [f].

[398] 3. AN *earl* is a title of nobility ſo antient, that it's original cannot clearly be traced out. Thus much ſeems tolerably certain: that among the Saxons they are called *ealdormen*, *quaſi* elder men, ſignifying the ſame as *ſenior* or *ſenator* among the Romans; and alſo *ſcbiremen*, becauſe they had each of them the civil government of a ſeveral diviſion or ſhire. On the irruption of the Danes, they changed the name to *earles*, which, according to Camden [g], ſignified the ſame in their language. In Latin they are called *comites* (a title firſt uſed in the empire) from being the king's attendants; "*a ſocietate* "*nomen ſumpſerunt, reges enim tales ſibi aſſociant* [h]." After the Norman conqueſt they were for ſometime called *counts* or *countees*, from the French; but they did not long retain that name themſelves, though their ſhires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once obſerved, is now entirely devolved on the ſheriff, the earl's deputy, or *vice-comes*. In writs and commiſſions, and other formal inſtruments, the king, when he mentions any peer of the degree of an earl, uſually ſtiles him, "truſty and well beloved *couſin*:" an appellation as antient as the reign of Henry IV: who being either by his wife, his mother, or his ſiſters, actually related or allied to every earl then in the kingdom, artfully and conſtantly acknowleged that connection in all his letters and other public acts: from whence the uſage has deſcended to his ſucceſſors, though the reaſon has long ago failed.

4. THE name of *vice-comes* or *viſcount* (2) was afterwards made uſe of as an arbitrary title of honour, without any ſha-

[f] 2 Inſt. 5. [g] Britan. *tit. ordines.* [h] Bracton. *l.* 1. *c.* 8. Flet. *l.* 1. *c.* 5.

(2) Theſe Latin and French words are the ſame as ſheriff in Engliſh. This proves the high reſpect that was ſhewn to this officer in

dow of office pertaining to it, by Henry the ſixth; when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of viſcount Beaumont, which was the firſt inſtance of the kind [i].

5. A *baron*'s is the moſt general and univerſal title of nobility; for originally every one of the peers of ſuperior rank had alſo a barony annexed to his other titles [k] (3). But it hath

[i] 2 Inſt. 5. [k] 2 Inſt. 5, 6.

in ancient times, for his name alone was thought an honourable title of nobility. See note 8. p. 346.

(3) At the time of the conqueſt, the temporal nobility conſiſted only of earls and barons; and by whatever right the earls and the mitred clergy before that time might have attended the great council of the nation, it abundantly appears that they afterwards ſat in the feudal parliament in the character of barons. It has been truly ſaid, that for ſome time after the conqueſt, wealth was the only nobility, as there was little perſonal property at that time, and a right to a ſeat in parliament was entirely territorial, or depended upon the tenure of landed property. Ever ſince the conqueſt, it has been true, that all land is held either immediately or mediately of the king; that is, either of the king himſelf, or of a tenant of the king, or it might be after two or more ſubinfeudations. And it was alſo a general principle in the feudal ſyſtem, that every tenant of land, or land owner, had both a right and obligation to attend the court of his immediate ſuperior. Hence every tenant *in capite*, i. e. the tenant of the king, was at the ſame time entitled and bound to attend the king's court or parliament, being the great court baron of the nation.

It will not be neceſſary for me here to enlarge farther upon the original principles of the feudal ſyſtem, and upon the origin of peerage; but I ſhall briefly abridge the account which Selden has given in the ſecond part of his Titles of Honour, c. 5. beginning at the 17th ſection, being perhaps the cleareſt and moſt ſatisfactory that can be found. He divides the time from the conqueſt into three periods: 1. From the conqueſt to the latter end of the reign of king John. 2. From that time to the 11th of Richard II. 3. From that period to the time he is writing, which may now be extended to the preſent time. In the firſt period, all, who held any quantity of land of the king, had, without diſtinction, a right to be ſummoned to parliament and this right being confined ſolely to the king's tenants,

ſometimes happened that, when an antient baron hath been raiſed to a new degree of peerage, in the courſe of a few generations the two titles have deſcended differently; one perhaps to the male deſcendants, the other to the heirs general; whereby the earldom or other ſuperior title hath ſubſiſted

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tenants, of conſequence all the peers of parliament during that period ſat by virtue of tenure and a writ of ſummons.

In the beginning of the ſecond period, that is, in the laſt year of the reign of king John, a diſtinction, very important in it's conſequences, (for it eventually produced the lower houſe of parliament,) was introduced, *viz.* a diviſion of theſe tenants into greater and leſſer barons: for king John in his *magna charta* declares, *faciemus ſummoneri archiepiſcopos, epiſcopos, abbates, comites, et majores barones regni ſigillatim per literas noſtras, et præterea faciemus ſummoneri in generali per vicecomites et ballivos noſtros omnes alios, qui in capite tenent de nobis ad certum diem, &c.* See Bl. Mag. Ch. Joh. p. 14. It does not appear that it ever was aſcertained what conſtituted a greater baron, and it probably was left to the king's diſcretion to determine; and no great inconvenience could have reſulted from it's remaining indefinite, for thoſe who had not the honour of the king's letter, would have what in effect was equivalent, a general ſummons from the ſheriff. But in this ſecond period tenure began to be diſregarded, and perſons were ſummoned to the parliament by writ, who held no lands of the king. This continued to be the caſe till the 11th of Rich. II. when the practice of creating peers by letters patent firſt commenced.

In that year John de Beauchamp, ſteward of the houſehold to Rich. II. was created by patent lord Beauchamp baron of Kidderminſter in tail male; and ſince that time peerages have been created both by writ and patent, without any regard to tenure or eſtate.

The king's prerogative of creating peers by patent may ſeem a great innovation, or a violation of the original principles of the ſyſtem; yet it is one of thoſe great changes, which are produced at the firſt by a gentle deviation from the former practice. For though this prerogative was not granted to the king by the expreſs authority of parliament, yet it was obtained by it's acquieſcence; for I have been aſſured by Mr. Townſhend, the Windſor herald, a gentleman well acquainted with this ſubject, that patents of nobility in ancient times generally ſtated, either that the patent was granted by the aſſent of parliament, or, if granted in the vacation, they ſtated ſuch ſpecial reaſons why the peer was created, as it might be preſumed would afterwards meet with the approbation of the parliament.

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without a barony: and there are alſo modern inſtances, where earls and viſcounts have been created without annexing a barony to their other honours: ſo that now the rule doth not hold univerſally, that all peers are barons. The original and antiquity of baronies have occaſioned great inquiries among our Engliſh antiquaries. The moſt probable opinion ſeems to be, that they were the ſame with our preſent lords of manors; to which the name of court baron (which is the lord's court, and incident to every manor) gives ſome countenance (4). It may be collected from king John's *magna carta*[l], that originally all lords of manors, or barons, that held of the king *in capite*, had ſeats in the great council or parliament: till about the reign of that prince the conflux of them became ſo large and troubleſome, that the king was obliged to divide them, and ſummon only the greater barons in perſon; leaving the ſmall ones to be ſummoned by the ſheriff, and (as it is ſaid) to ſit by repreſentation in another houſe; which gave riſe to the ſeparation of the two houſes of parliament[m]. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but ſuch as were ſummoned by writ, in reſpect of the tenure of their lands or baronies, till Richard the ſecond firſt made it a mere title of honour, by conferring it on divers perſons by his letters patent[n].

HAVING made this ſhort inquiry into the original of our ſeveral degrees of nobility, I ſhall next conſider the manner in which they may be created. The right of peerage ſeems to have been originally territorial; that is, annexed to lands, honours, caſtles, manors, and the like, the proprietors and

[l] *cap.* 14.
[m] Gilb. Hiſt. of exch. c. 3. Seld. tit. of hon. 2. 5. 21.
[n] 1 Inſt. 9. Seld. *Jan. Angl.* 2. § 66.

(4) Lords of manors, who had granted to others by ſubinfeudation part of that eſtate which they held of the king, would neceſſarily be barons; but it does not follow converſely that a baron was of neceſſity a lord of a manor: for the king's tenant, who retained all the eſtate granted him, and alienated no part of it, would certainly be as complete a baron as a lord of a manor.

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poſſeſſors of which were (in right of thoſe eſtates) allowed to be peers of the realm, and were ſummoned to parliament to do ſuit and ſervice to their ſovereign: and, when the land was alienated, the dignity paſſed with it as appendant. Thus the biſhops ſtill ſit in the houſe of lords in right of ſucceſſion to certain antient baronies annexed, or ſuppoſed to be annexed, to their epiſcopal lands [o]: and thus, in 11 Hen. VI, the poſſeſſion of the caſtle of Arundel was adjudged to confer an earldom on it's poſſeſſor [p]. But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and inſtead of territorial became perſonal. Actual proof of a tenure by barony became no longer neceſſary to conſtitute a lord of parliament; but the record of the writ of ſummons to him or his anceſtors was admitted as a ſufficient evidence of the tenure.

PEERS are now created either by writ, or by patent: for thoſe who claim by preſcription muſt ſuppoſe either a writ or patent made to their anceſtors; though by length of time it is loſt. The creation by writ, or the king's letter, is a ſummons to attend the houſe of peers, by the ſtile and title of that barony, which the king is pleaſed to confer: that by patent is a royal grant to a ſubject of any dignity and degree of peerage. The creation by writ is the more antient way; but a man is not ennobled thereby, unleſs he actually take his ſeat in the houſe of lords: and ſome are of opinion that there muſt be at leaſt two writs of ſummons, and a ſitting in two diſtinct parliaments, to evidence an hereditary barony [q]: and therefore the moſt uſual, becauſe the ſureſt, way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himſelf makes uſe of it [r]. Yet it is frequent to call up the eldeſt ſon of a peer to the houſe of lords by writ of ſummons, in the name of his father's barony: becauſe in that caſe there is no danger of his children's loſing the nobility in caſe he never takes his ſeat; for they will ſucceed to their grand-

[o] Glan. *l.* 7. *c.* 1.
[p] Seld. tit. of hon. b. 2. c. 9. § 5.
[q] Whitelocke of parl. ch. 114.
[r] Co. Litt. 16.

father.

father (5). Creation by writ has alſo one advantage over that by patent: for a perſon created by writ holds the dignity to him *and his heirs*, without any words to that purport in the [401] writ (6); but in letters patent there muſt be words to direct the inheritance, elſe the dignity enures only to the grantee for life[s]. For a man or woman may be created noble for their own lives, and the dignity not deſcend to their heirs at all, or deſcend only to ſome particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his preſent lady, and not to ſuch heirs by any former or future wife.

LET us next take a view of a few of the principal incidents attending the nobility, excluſive of their capacity as members of parliament, and as hereditary counſellors of the crown; both of which we have before conſidered. And firſt we muſt obſerve, that in criminal caſes a nobleman ſhall be tried by his peers (7). The great are always obnoxious to popular envy: were they to be judged by the people, they might be in dan-

[s] Co. Litt. 9. 16.

(5) And where the father's barony is limited by patent to him and the heirs male of his body, and his eldeſt ſon is called up to the houſe of lords by writ with the title of this barony, the writ in this caſe will not create a fee or a general eſtate tail, ſo as to make a female capable of inheriting the title, but upon the death of the father the two titles unite, or become one and the ſame. Caſe of the claim to the barony of Sidney of Penſhurſt diſallowed. *Dom. Proc.* 17 *June* 1782.

(6) Though this is the authority of lord Coke, it is now underſtood to be erroneous; a creation by writ does not confer a fee-ſimple in the title, but only an eſtate tail general; for every claimant of the title muſt be deſcended from the perſon firſt ennobled. 1 *Woodd.* 37.

(7) A nobleman is tried by his peers only in treaſon and felony, and miſpriſion of the ſame; but in all miſdemeanors, as libels, riots, perjury, conſpiracies, &c. he is tried like a commoner by a jury. 3 *Inſt.* 30. 2 *Hawk.* 424.

ger from the prejudice of their judges; and would moreover be deprived of the privilege of the meaneſt ſubjects, that of being tried by their equals, which is ſecured to all the realm by *magna carta*, c. 29. It is ſaid, that this does not extend to biſhops: who, though they are lords of parliament, and ſit there by virtue of their baronies which they hold *jure eccleſiæ*, yet are not ennobled in blood (8), and conſequently not peers with the nobility[s]. As to peereſſes, there was no precedent for their trial when accuſed of treaſon or felony, till after Eleanor ducheſs of Glouceſter, wife to the lord protector, was accuſed of treaſon and found guilty of witchcraft, in an eccleſiaſtical ſynod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occaſion to a ſpecial ſtatute, 20 Hen. VI. c. 9. which declares[t] the law to be, that peereſſes, either in their own right or by marriage, ſhall be tried before the ſame judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, ſhe ſtill remains noble (9), and ſhall be tried by

[s] 3 Inſt. 30, 31. [t] Moor. 769. 2 Inſt. 50. 6 Rep. 52. Staundf. P. C. 152.

(8) It has always appeared to me that the reaſon given in the books, why biſhops ſhould not be tried in parliament like the temporal lords, *viz.* becauſe they are not ennobled by blood, or, as Selden expreſſes it, becauſe their honour is not inheritable (*Jud. in Parl.* c. 1.), is unſatisfactory and even trifling.

If this reaſon has any operation, why ſhould it not be extended, and deprive them of all the rights of peerage? A peer may be created by patent for his own life only; and it cannot be ſuppoſed that ſuch a nobleman would not be entitled to a trial by his peers in parliament. If there were any trials of biſhops by a jury in remote times, the biſhops could not have demanded a trial in parliament without admitting themſelves ſubject to a temporal juriſdiction, from which the clergy in antient times claimed a total exemption. Hence it may be conjectured the biſhops have loſt their right to be tried in parliament, though only two inſtances can be found of their being tried by a jury, *viz.* thoſe of archbiſhop Cranmer and biſhop Fiſher. 2 *Hawk.* 596.

(9) But ſhe communicates no rank or title to her huſband. *Harg. Co. Litt.* 326. *b.* There have been claims, and theſe are ſupported

her peers: but if ſhe be only noble by marriage, then by a ſecond marriage with a commoner, ſhe loſes her dignity; for as by marriage it is gained, by marriage it is alſo loſt [t] (10). Yet if a ducheſs dowager marries a baron, ſhe continues a ducheſs ſtill; for all the nobility are *pares*, and [402] therefore it is no degradation [u]. A peer, or peereſs, (either in her own right or by marriage,) cannot be arreſted in civil caſes [v]: and they have alſo many peculiar privileges annexed to their peerage in the courſe of judicial proceedings. A peer, ſitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour [w]: he anſwers alſo to bills in chancery upon his honour, and not upon his oath [x]; but when he is examined as a witneſs either in civil or criminal caſes, he muſt be ſworn [y] (11): for the reſpect, which the law ſhews to the honour of a peer, does not extend ſo far as to overturn a ſettled maxim, that *in judicio non creditur niſi juratis* [z]. The honour of peers is

[t] Dyer. 79. Co. Litt. 16.
[u] 2 Inſt. 50.
[v] Finch. L. 355. 1 Vent. 298.
[w] 2 Inſt. 49.
[x] 1 P. Wms. 146.
[y] Salk. 512.
[z] Cro. Car. 64.

ſupported by authorities, by a huſband after iſſue to aſſume the title of his wife's dignity, and after her death to retain the ſame as tenant by the curteſy; but from Mr. Hargrave's ſtatement of this ſubject, in *Co. Litt.* 29. *b.* n. 1. there is no probability that ſuch a claim would now be allowed.

(10) Yet ſhe is commonly called and addreſſed by the ſtile and title which ſhe bore before her ſecond marriage, but this is only by courteſy; as the daughters of dukes, marquiſſes, and earls are uſually addreſſed by the title of lady, though in law they are commoners. In a writ of partition brought by Ralph Haward and lady Ann Powes his wife, the court held that it was a miſnomer, and that it ought to have been by Ralph Haward and Ann his wife, late wife of lord Powes deceaſed. *Dyer*, 79.

(11) If he is examined as a witneſs in the high court of parliament, he muſt be ſworn. The biſhop of Oxford was ſworn in the impeachment of lord Macclesfield, and lord Mansfield (then lord Stormont) in that of Mr. Haſtings.

however ſo highly tendered by the law, that it is much more penal to ſpread falſe reports of them and certain other great officers of the realm, than of other men: ſcandal againſt them being called by the peculiar name of *ſcandalum magnatum*, and ſubjected to peculiar puniſhments by divers antient ſtatutes[a].

A PEER cannot loſe his nobility, but by death or attainder; though there was an inſtance in the reign of Edward the fourth of the degradation of George Nevile duke of Bedford by act of parliament[b], on account of his poverty, which rendered him unable to ſupport his dignity[c]. But this is a ſingular inſtance: which ſerves at the ſame time, by having happened, to ſhew the power of parliament; and, by having happened but once, to ſhew how tender the parliament hath been, in exerting ſo high a power. It hath been ſaid indeed[d], that if a baron waſtes his eſtate, ſo that he is not able to ſupport the degree, the *king* may degrade him: but it is expreſsly held by later authorities[e], that a peer cannot be degraded but by act of *parliament*.

[403] THE commonalty, like the nobility, are divided into ſeveral degrees; and, as the lords, though different in rank, yet all of them are peers in reſpect of their nobility, ſo the commoners, though ſome are greatly ſuperior to others, yet all are in law peers, in reſpect of their want of nobility[f].

THE firſt name of dignity, next beneath a peer, was antiently that of *vidames*, *vice-domini*, or *valvaſors*[g]: who are mentioned by our antient lawyers[h] as *viri magnae dignitatis*; and ſir Edward Coke[i] ſpeaks highly of them. Yet they

[a] 3 Edw. I. c. 34. 2 Ric. II. ſt. 1. c. 5. 12 Ric. II. c. 11.

[b] 4 Inſt. 355.

[c] The preamble to the act is remarkable; "foraſmuch as oftentimes it is "ſeen, that when any lord is called to "high eſtate, and hath not convenient "livelihood to ſupport the ſame dignity, "it induceth great poverty and indi-"gence, and cauſeth oftentimes great "extortion, embracery, and maintenance to be had; to the great trouble "of all ſuch countries where ſuch eſtate "ſhall happen to be: therefore, &c."

[d] Moor. 678.

[e] 12 Rep. 107. 12 Mod. 56.

[f] 2 Inſt. 29.

[g] Camden. *Britan. t. ordines.*

[h] Bracton. *l.* 1. *c.* 8.

[i] 2 Inſt. 567.

are

are now quite out of uſe; and our legal antiquaries are not agreed upon even their original or antient office.

Now therefore the firſt perſonal dignity, after the nobility, is a *knight* of the order of St. George, or *of the garter:* firſt inſtituted by Edward III, *A. D.* 1344[k]. Next (but not till after certain *official* dignities, as privy counſellors, the chancellors of the exchequer and duchy of Lancaſter, the chief juſtice of the king's bench, the maſter of the rolls, and the other Engliſh judges) follows a *knight banneret*; who indeed by ſtatutes 5 Ric. II. ſt. 2. c. 4. and 14 Ric. II. c. 11. is ranked next after barons; and his precedence before the younger ſons of viſcounts was confirmed to him by order of king James I, in the tenth year of his reign[l]. But, in order to entitle himſelf to this rank, he muſt have been created by the king in perſon, in the field, under the royal banners, in time of open war[m]. Elſe he ranks after *baronets;* who are the next order; which title is a dignity of inheritance, created by letters patent, and uſually deſcendible to the iſſue male. It was firſt inſtituted by king James the firſt, *A. D.* 1611, in order to raiſe a competent ſum for the reduction of the province of Ulſter in Ireland (12); for which reaſon all baronets have the arms of Ulſter ſuperadded to their family coat (13). Next follow *knights of the bath;* an order inſtituted by king [404] Henry IV. and revived by king George the firſt. They are ſo called from the ceremony of bathing, the night before their creation. The laſt of theſe inferior nobility are *knights bachelors* (14); the moſt antient, though the loweſt order of knight-

k Seld. tit. of hon. 2. 5. 41. l *Ibid.* 2. 11. 3. m 4 Inſt. 6.

(12) One hundred gentlemen advanced each one thouſand pounds; for which this title was conferred upon them. 2 *Rap.* 185 *fo.*

(13) The arms of Ulſter are, a hand *gules*, or a bloody hand in a field *argent.*

(14) The moſt probable derivation of the word bachelor is from *bas* and *chevalier*, an inferior knight; and thence latinized into the barbarous word *baccalaureus. Ducange. Bac.*

The loweſt graduates in the univerſities are ſtiled *bachelors*, and were, till lately, addreſſed with ſir before their ſurname; as in

hood amongſt us: for we have an inſtance[n] of king Alfred's conferring this order on his ſon Athelſtan. The cuſtom of the antient Germans was to give their young men a ſhield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's houſehold; after it, as part of the community[o]. Hence ſome derive the uſage of knighting, which has prevailed all over the weſtern world, ſince it's reduction by colonies from thoſe northern heroes. Knights are called in Latin *equites aurati: aurati*, from the gilt ſpurs they wore; and *equites*, becauſe they always ſerved on horſeback: for it is obſervable[p], that almoſt all nations call their knights by ſome appellation derived from an horſe (15). They are alſo called in our law *milites*, becauſe they formed a part of the royal army, in virtue of their feodal tenures; one condition of which was, that every one who held a kinght's fee immediately under the crown (which in Edward the ſecond's time[q] amounted to 20 *l. per annum*) was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raiſe money in the reign of Charles the firſt, gave great offence: though warranted by law, and the recent example of queen Elizabeth (16):

[n] Will. Malmſb. *lib.* 2.
[o] Tac. *de Morib. Germ.* 13.
[p] Camd. *ibid.* Co. Litt. 74.
[q] Stat. *de milit.* 1 Ed. II.

Latin they are ſtill called *domini*. It is ſomewhat remarkable, that whilſt this feudal word has long been appropriated to ſingle men, another feudal term of higher dignity, *viz.* baron, ſhould, in legal language, be applied to thoſe who are married.

(15) It does not appear that the Engliſh word *knight* has any reference to a horſe; for knight, or cniht in the Saxon, ſignified *puer, ſervus*, or attendant. 2 *Seld. tit. hon. c.* 5. *f.* 33.

(16) Conſiderable fees accrued to the king upon the performance of the ceremony. Edward VI. and queen Elizabeth had appointed commiſſioners to compound with all perſons, who had lands to the amount of 40 *l.* a year, and who declined the honour and expence of knighthood. Charles the firſt followed their example;

but it was by the ſtatute 16 Car. I. c. 16. aboliſhed; and this kind of knighthood has, ſince that time, fallen into great diſregard.

THESE, ſir Edward Coke ſays[r], are all the names of *dignity* in this kingdom, eſquires and gentlemen being only names of *worſhip*. But before theſe laſt the heralds rank all colonels, ſerjeants at law, and doctors in the three learned [405] profeſſions[s].

[r] 2 Inſt. 667.

[s] The rules of precedence in England may be reduced to the following table: in which thoſe marked * are entitled to the rank here allotted them, by ſtatute 31 Hen. VIII. c. 10.—— marked †, by ſtatute 1 W. & M. c. 21.——marked ‖, by letters patent 9, 10, and 14 Jac. I. which ſee in Seld. tit. of hon. II. 5. 46, and II. 11. 3.——marked ‡, by antient uſage and eſtabliſhed cuſtom; for which ſee (among others) Camden's Britannia, *tit. ordines*. Milles's catalogue of honour, *edit.* 1610. and Chamberlayne's preſent State of England. b. 3. ch. 3.

TABLE OF PRECEDENCE.

* The king's children and grandchildren.
* - - - - brethren.
* - - - - uncles.
* The king's nephews.
* Archbiſhop of Canterbury (17).
* Lord chancellor or keeper, if a baron.
* Arch-

ample; upon which Mr. Hume artfully remarks, that "nothing "proves more plainly, how ill-diſpoſed the people were to the "meaſures of government, than to obſerve, that they loudly "complained of an expedient, founded on poſitive ſtatute, and "warranted by ſuch recent precedents." 6 Vol. 296.

(17) It is ſaid, that before the conqueſt, by a conſtitution of pope Gregory, the two archbiſhops were equal in dignity, and in the number of biſhops ſubject to their authority; and that William the conqueror thought it prudent to give precedence and ſuperiority to the archbiſhop of Canterbury; but Thomas archbiſhop of York was unwilling to acknowledge his inferiority to Lanfranc archbiſhop of Canterbury, and appealed to the pope, who referred the matter to the king and barons; and in a council held at Windſor-caſtle, they decided in favour of the archbiſhop of Canterbury. *Godw. Comm. de Præſul.* 665.

But the archbiſhops of York long afterwards refuſed to acquieſce in this deciſion, for biſhop Godwin relates a curious and ludicrous ſtruggle, which took place in the reign of Hen. II. above one hundred years afterwards, between Roger archbiſhop of York, and

ESQUIRES and gentlemen are confounded together by ſir Edward Coke, who obſerves [a], that every eſquire is a gentle-

* Archbiſhop of York.
* Lord treaſurer.
* Lord preſident of the council. } If barons.
* Lord privy ſeal.
* Lord great chamberlain. But ſee private ſtat. 1 Geo. I. c. 3.
* Lord high conſtable.
* Lord marſhall.
* Lord admiral.
* Lord ſteward of the houſhold.
* Lord chamberlain of the houſhold.
} above all peers of their own degree.
* Dukes.
* Marqueſſes.
‡ Dukes' eldeſt ſons.
* Earls.
‡ Marqueſſes' eldeſt ſons.
‡ Dukes' younger ſons.
* Viſcounts.
‡ Earls' eldeſt ſons.
‡ Marqueſſes' younger ſons.
* Secretary of ſtate, if a biſhop.
* Biſhop of London.
* - - - Durham.
* - - - Wincheſter.
* Biſhops.
* Secretary of ſtate, if a baron.
* Barons.
† Speaker of the houſe of commons.
† Lords commiſſioners of the great ſeal.
‡ Viſcounts' eldeſt ſons.
‡ Earls' younger ſons.
‡ Barons' eldeſt ſons.
‖ Knights of the Garter.
‖ Privy counſellors.
‖ Chancellor of the exchequer.
‖ Chancellor of the duchy.
‖ Chief juſtice of the king's bench.
‖ Maſter of the rolls.
‖ Chief juſtice of the common pleas.
‖ Chief baron of the exchequer.
‖ Judges, and barons of the coif.
‖ Knights bannerets, royal.
‖ Viſcounts' younger ſons.
‖ Barons' younger ſons.
‖ Baronets.
‖ Knights bannerets.
‡ Knights of the Bath.
‡ Knights bachelors.
‖ Baronets' eldeſt ſons.
‖ Knights' eldeſt ſons.
‖ Baronets' younger ſons.
‖ Knights' younger ſons.
‡ Colonels.
‡ Serjeants at law.
‡ Doctors.
‡ Eſquires.
‡ Gentlemen.
‡ Yeomen.
‡ Tradeſmen.
‡ Artificers.
‡ Labourers.

N. B. Married women and widows are entitled to the ſame rank among each other, as their huſbands would reſpectively have born between themſelves, except ſuch rank is merely profeſſional or official;—and unmarried women to the ſame rank as their eldeſt brothers would bear among men, during the lives of their fathers.

[a] 2 Inſt. 668.

Richard archbiſhop of Canterbury, for the chair on the right hand of the pope's legate. *Ib.* 79. Perhaps to this deciſion, and their former equality, we may refer the preſent diſtinction between them; *viz.* that the archbiſhop of Canterbury is primate of all England, and the archbiſhop of York is primate of England.

man,

man, and a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one anceſtor at leaſt, who had borne ſome curule office. It is indeed a matter ſomewhat unſettled, what conſtitutes the diſtinction, or who is a real *eſquire*; for it is not an eſtate, however large, that confers this rank upon it's owner. Camden, who was himſelf a herald, diſtinguiſhes them the moſt accurately; and he reckons up four ſorts of them [t]: 1. The eldeſt ſons of knights, and their eldeſt ſons, in perpetual ſucceſſion [u]: 2. The eldeſt ſons of younger ſons of peers, and their elder ſons in like perpetual ſucceſſion: both which ſpecies of eſquires ſir Henry Spelman entitles *armigeri natalitii* [w]. 3. Eſquires created by the king's letters patent, or other inveſtiture (18); and their eldeſt ſons. 4. Eſquires by virtue of their offices; as juſtices of the peace, and others who bear any office of truſt under the crown (19). To theſe may be added the eſquires of knights of the bath, each of whom conſtitutes three at his inſtallation: and all foreign, nay, Iriſh peers; for not only theſe, but the eldeſt ſons of peers of Great Britain, though frequently titular lords, are only eſquires in the law, and muſt be ſo named in all legal

[t] 2. Inſt. 668. [u] 2 Inſt. 667. [w] Gloſſ. 43.

(18) This creation has long been diſuſed. Eſquires thus created were inveſted *calcaribus argentatis*, to diſtinguiſh them from the *equites aurati*. In the life of Chaucer, we are told that he was created ſcutifer to Edward III. Scutifer is the ſame as armiger; and our word eſquire is derived from *ſcutum*, or the French *eſcu* a ſhield.

(19) I cannot but think that this is too extenſive a deſcription of an eſquire, for it would beſtow that honour upon every exciſeman and cuſtom-houſe officer; it probably ought to be limited to thoſe only who bear an office of truſt under the crown, and who are ſtiled eſquires by the king in their commiſſions and appointments; and all I conceive who are once honoured by the king with the title of eſquire, have a right to that diſtinction for life.

proceed-

proceedings [x] (20). As for *gentlemen*, ſays ſir Thomas Smith [y], they be made good cheap in this kingdom: for whoſoever ſtudieth the laws of the realm, who ſtudieth in the univerſities, who profeſſeth the liberal ſciences, and (to be ſhort) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he ſhall be called maſter, and ſhall be taken for a gentleman (21). A *yeoman* is he that hath free land of forty ſhillings by the year; who was antiently thereby qualified to ſerve on
[407] juries, vote for knights of the ſhire, and do any other act, where the law requires one that is *probus et legalis homo* [z].

THE reſt of the commonalty are *tradeſmen*, *artificers*, and *labourers*; who (as well as all others) muſt in purſuance of the ſtatute 1 Hen. V. c. 5. be ſtiled by the name and addition of their eſtate, degree, or myſtery, and the place to which they belong, or where they have been converſant, in all original writs of actions perſonal, appeals, and indictments, upon

[x] 3 Inſt. 30. 2 Inſt. 667. [z] 2 Inſt. 668.
[y] Commonw. of Eng. b. 1. c. 20.

(20) It is rather remarkable that the learned Judge ſhould have forgotten to mention another claſs of eſquires, viz. barriſters. Sir Henry Spelman is of opinion that their claim to this title is founded in uſurpation, for with ſome ſpleen he informs us, *certè altero hinc ſæculo nominatiſſimus in patriâ juriſconſultus, ætate provectior, etiam munere gaudens publico et prædiis ampliſſimis, generoſi titulo bene ſe habuit; fortè, quod togatæ genti magis tunc conveniret civilis illa appellatio quam caſtrenſis altera. Gloſſ. voc.* Arm. But this length of enjoyment has eſtabliſhed ſuch a right to this diſtinction, that the court of common pleas refuſed to hear an affidavit read, becauſe a barriſter named in it was not called an eſquire, 1 *Wilſ.* 244.

(21) The eldeſt ſon has no prior claim to the degree of gentleman; for it is the text of Littleton, that "every ſon is as great a "gentleman as the eldeſt." *Sect.* 210.

which

which proceſs of outlawry may be awarded (22); in order, as it ſhould ſeem, to prevent any clandeſtine or miſtaken outlawry, by reducing to a ſpecific certainty the perſon who is the object of it's proceſs (23).

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(22) Informations in the nature of *quo warranto*, are not within the ſtatute of additions. 1 *Wilſ.* 244.

(23) Theſe are the ranks and degrees into which the people of England are divided, and which were created, and are preſerved, for the reciprocal protection and ſupport of each other. But to excite diſcontent, and to ſtir up rebellion againſt all good order and peaceful government, a propoſition has lately been induſtriouſly propagated, *viz.* that all men are by nature equal. If this ſubject is conſidered even for a moment, the very reverſe will appear to be the truth, and that all men are by nature unequal. For though children come into the world equally helpleſs, yet in a few years, as ſoon as their bodies acquire vigour, and their minds and paſſions are expanded and developed, we perceive an infinite difference in their natural powers, capacities, and propenſities; and this inequality is ſtill further increaſed by the inſtruction which they happen to receive.

Independent of any poſitive regulations, the unequal induſtry and virtues of men muſt neceſſarily create unequal rights. But it is ſaid that all men are equal becauſe they have an equal right to juſtice, or to the poſſeſſion of their rights. This is a ſelf-evident truth, which no one ever denied, and it amounts to nothing more than to the identical propoſition, that all men have equal rights to their rights; for when different men have perfect and abſolute rights to unequal things, they are certainly equal with regard to the perfection of their rights, or the juſtice that is due to their reſpective claims. This is the only ſenſe in which equality can be applied to mankind. In the moſt perfect republic that can be conceived in theory, the propoſition is falſe and miſchievous; the farther and child, the maſter and ſervant, the judge and priſoner, the general and common ſoldier, the repreſentative and conſtituent, muſt be eternally unequal, and have unequal rights.

And where every office is elective, the moſt virtuous and the beſt qualified to diſcharge the duties of any office, have rights and claims ſuperior to others.

One celebrated philoſopher has endeavoured to prove the natural equality of mankind, by obſerving, "that the weakeſt has "ſtrength enough to kill the ſtrongeſt, either by ſecret machina-

"tions,

" tions, or by confederacy with others, that are in the ſame dan-
" ger with himſelf." *Hobbes's Lev.* c. xiii.

From ſuch a doctrine, ſupported by ſuch reaſons, we cannot be ſurpriſed at the conſequences, when an attempt is made to reduce it to practice.

Subordination in every ſociety is the bond of it's exiſtence; the higheſt and the loweſt individuals derive their ſtregth and ſecurity from their mutual aſſiſtance and dependence; as in the natural body, *the eye cannot ſay to the hand I have no need of thee; nor again, the head to the feet, I have no need of you.* Milton was ſo convinced of the neceſſity of ſubordination and degrees, that he makes Satan, even when warring againſt heaven's King, addreſs his legions thus:

If not equal all, yet free,
Equally free; for orders and degrees
Jar not with liberty, but well conſiſt. *B.* 5. *l.* 790.

True liberty reſults from making every higher degree acceſſible to thoſe who are in a lower, if virtue and talents are there found to deſerve advancement.

In this happy country, the ſon of the loweſt peaſant may riſe by his merit and abilities to the higheſt ſtations in the church, law, army, navy, and in every department of the ſtate. The doctrine, that all men are, or ought to be, equal, is little leſs contrary to nature, and deſtructive of their happineſs, than the invention of Procruſtes, who attempted to make men equal by ſtretching the limbs of ſome, and lopping off thoſe of others.

But the experiment has been tried, and the reſult has hitherto been (an awful warning to the world) a rapid ſucceſſion of aſſaſſinations, judicial murders, and proſcriptions.

Ceterùm libertas et ſpecioſa nomina prætexuntur; nec quiſquam alienam ſervitium et dominationem ſibi concupivit, ut non eadem iſta vocabula uſurparet. Tac. Hiſt. iv. c. 73.

CHAPTER THE THIRTEENTH.

OF THE MILITARY AND MARITIME STATES.

THE military ſtate includes the whole of the ſoldiery; or, ſuch perſons as are peculiarly appointed among the reſt of the people for the ſafeguard and defence of the realm.

IN a land of liberty it is extremely dangerous to make a diſtinct order of the profeſſion of arms. In abſolute monarchies this is neceſſary for the ſafety of the prince, and ariſes from the main principle of their conſtitution, which is that of governing by fear: but in free ſtates the profeſſion of a ſoldier, taken ſingly and merely as a profeſſion, is juſtly an object of jealouſy. In theſe no man ſhould take up arms, but with a view to defend his country and it's laws: he puts not off the citizen when he enters the camp; but it is becauſe he is a citizen, and would wiſh to continue ſo, that he makes himſelf for a while a ſoldier. The laws therefore and conſtitution of theſe kingdoms know no ſuch ſtate as that of a perpetual ſtanding ſoldier, bred up to no other profeſſion than that of war: and it was not till the reign of Henry VII, that the kings of England had ſo much as a guard about their perſons.

IN

IN the time of our Saxon anceſtors, as appears from Edward the confeſſor's laws[a], the military force of this kingdom was in the hands of the dukes or heretochs, who were conſtituted through every province and county in the kingdom; being taken out of the principal nobility, and ſuch as were moſt remarkable for being "*ſapientes, fideles, et animoſi.*" Their duty was to lead and regulate the Engliſh armies, with
[409] a very unlimited power; "*prout eis viſum fuerit, ad honorem* "*coronae et utilitatem regni.*" And becauſe of this great power they were elected by the people in their full aſſembly, or folkmote, in the ſame manner as ſheriffs were elected: following ſtill that old fundamental maxim of the Saxon conſtitution, that where any officer was intruſted with ſuch power, as if abuſed might tend to the oppreſſion of the people, that power was delegated to him by the vote of the people themſelves[b]. So too, among the antient Germans, the anceſtors of our Saxon forefathers, they had their dukes, as well as kings, with an independent power over the military, as the kings had over the civil ſtate. The dukes were elective, the kings hereditary: for ſo only can be conſiſtently underſtood that paſſage of Tacitus[c], "*reges ex nobilitate, duces ex virtute* "*ſumunt;*" in conſtituting their kings, the family or blood royal was regarded; in chuſing their dukes or leaders, warlike merit; juſt as Cæſar relates of their anceſtors in his time, that whenever they went to war, by way either of attack or defence, they *elected* leaders to command them[d]. This large ſhare of power, thus conferred by the people, though intended to preſerve the liberty of the ſubject, was perhaps unreaſonably detrimental to the prerogative of the crown: and accordingly we find a very ill uſe made of it by Edric duke of Mercia, in the reign of king Edmund Ironſide; who, by his

[a] *c. de heretochiis.*

[b] "*Iſti vero viri eliguntur per com-* "*mune conſilium, pro communi utilitate* "*regni, per provincias et patrias univer-* "*ſas, et per ſingulos comitatus, in pleno* "*folkmote, ſicut et vicecomites, provinci-* "*arum et comitatuum eligi debent.*" *LL. Edw. Conſeſſ. ibid.* See alſo Bede, *eccl. hiſt. l. 5. c. 10.*

[c] *De morib. Germ. 7.*

[d] "*Quum bellum civitas aut illatum,* "*defendit aut infert, magiſtratus qui ei* "*bello praefint deliguntur.*" *De bell. Gall. l. 6. c. 22.*

office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at laſt transferred the crown to Canute the Dane.

IT ſeems univerſally agreed by all hiſtorians, that king Alfred firſt ſettled a national militia in this kingdom, and by his prudent diſcipline made all the ſubjects of his dominion ſoldiers: but we are unfortunately left in the dark as to the particulars of this his ſo celebrated regulation; though, from what was laſt obſerved, the dukes ſeem to have been left in poſſeſſion of too large and independent a power: which en- [410] abled duke Harold, on the death of Edward the confeſſor, though a ſtranger to the royal blood, to mount for a ſhort ſpace the throne of this kingdom, in prejudice of Edgar Atheling the rightful heir.

UPON the Norman conqueſt the feodal law was introduced here in all it's rigour, the whole of which is built on a military plan. I ſhall not now enter into the particulars of that conſtitution, which belongs more properly to the next part of our commentaries; but ſhall only obſerve, that in conſequence thereof all the lands in the kingdom were divided into what were called knights' fees, in number above ſixty thouſand (1); and for every knight's fee a knight or ſoldier, *miles*, was bound to attend the king in his wars, for forty days in a year (2); in which ſpace of time, before war was reduced to a ſcience, the campaign was generally finiſhed, and a kingdom either conquered or victorious [e]. By this means the king had, without any expenſe, an army of ſixty thouſand men al-

[e] The Poles are, even at this day, ſo tenacious of their antient conſtitution, that their poſpolite, or militia, cannot be compelled to ſerve above ſix weeks, or forty days, in a year. Mod. Un. Hiſt. xxxiv. 12.

(1) 60,215.

(2) We frequently read of half a knight, or other aliquot part, as for ſo much land three knights and a half, &c. were to be returned; the fraction of a knight was performed by a whole knight who ſerved half the time, or other due proportion of it.

ways

ways ready at his command. And accordingly we find one, among the laws of William the conqueror[f], which in the king's name commands and firmly enjoins the perſonal attendance of all knights and others; "*quod habeant et teneant ſe ſemper in* "*armis et equis, ut decet et oportet: et quod ſemper ſint prompti* "*et parati ad ſervitium ſuum integrum nobis explendum et pera-*"*gendum, cum opus adfuerit, ſecundum quod debent de feodis et* "*tenementis ſuis de jure nobis facere.*" This perſonal ſervice in proceſs of time degenerated into pecuniary commutations or aids, and at laſt the military part(3) of the feodal ſyſtem was aboliſhed at the reſtoration, by ſtatute 12 Car. II. c. 24.

IN the mean time we are not to imagine that the kingdom was left wholly without defence in caſe of domeſtic inſurrections, or the proſpect of foreign invaſions. Beſides thoſe, who by their military tenures were bound to perform forty days
[411] ſervice in the field, firſt the aſſiſe of arms, enacted 27 Hen. II[g], and afterwards the ſtatute of Wincheſter[h], under Edward I, obliged every man, according to his eſtate and degree, to provide a determinate quantity of ſuch arms as were then in uſe, in order to keep the peace: and conſtables were appointed in all hundreds by the latter ſtatute, to ſee that ſuch arms were provided. Theſe weapons were changed, by the ſtatute 4 & 5 Ph. & M. c. 2. into others of more modern ſervice: but both this and the former proviſions were repealed in the reign of James I[i]. While theſe continued in force, it was uſual from time to time for our princes to iſſue commiſſions of array, and ſend into every county officers in whom they could confide, to muſter and array (or ſet in military order) the inhabitants of every diſtrict; and the form of the

[f] c. 58. See Co. Litt. 75, 76.
[g] Hoved. *A. D.* 1181.
[h] 13 Edw. I. c. 6.
[i] Stat. 1 Jac. I. c. 25. 21 Jac. I. c. 28.

(3) The military or warlike part of the feudal ſyſtem was aboliſhed, when perſonal ſervice was diſpenſed with for a pecuniary commutation, as early as the reign of Henry II. But the military tenures ſtill remained till 12 Car. II. c. 24. See 2 vol. p. 77.

commiſſion of array was ſettled in parliament in the 5 Hen. IV, ſo as to prevent the inſertion therein of any new penal clauſes [k]. But it was alſo provided [l] that no man ſhould be compelled to go out of the kingdom at any rate, nor out of his ſhire but in caſes of urgent neceſſity; nor ſhould provide ſoldiers unleſs by conſent of parliament. About the reign of king Henry the eighth, or his children, lieutenants began to be introduced [m], as ſtanding repreſentatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the ſtatute 4 & 5 Ph. & M. c. 3. though they had not been then long in uſe, for Camden ſpeaks of them [n] in the time of queen Elizabeth, as extraordinary magiſtrates conſtituted only in times of difficulty and danger. But the introduction of theſe commiſſions of lieutenancy, which contained in ſubſtance the ſame powers as the old commiſſions of array, cauſed the latter to fall into diſuſe.

IN this ſtate things continued, till the repeal of the ſtatutes of armour in the reign of king James the firſt: after which when king Charles the firſt had, during his northern expeditions, iſſued commiſſions of lieutenancy, and exerted ſome military powers, which, having been long exerciſed, were thought to belong to the crown, it became a queſtion in the long parliament, how far the power of the militia did inherently reſide in the king; being now unſupported by any ſta- [412]
tute, and founded only upon immemorial uſage. This queſtion, long agitated, with great heat and reſentment on both ſides, became at length the immediate cauſe of the fatal rupture between the king and his parliament: the two houſes not only denying this prerogative of the crown, the legality of which perhaps might be ſomewhat doubtful; but alſo ſeiſing into their own hands the entire power of the militia, the illegality of which ſtep could never be any doubt at all.

SOON after the reſtoration of king Charles the ſecond, when the military tenures were aboliſhed, it was thought

[k] Ruſhworth. part 3. page 662. 667. 25 Edw. III. ſt. 5. c. 8. See 8 Rym. 374, &c.
[l] Stat. 1 Edw. III. ſt. 2. c. 5 & 7.
[m] 15 Rym. 75.
[n] *Brit.* 103. Edit. 1594.

proper to aſcertain the power of the militia, to recognize the ſole right of the crown to govern and command them, and to put the whole into a more regular method of military ſubordination [o]: and the order, in which the militia now ſtands by law, is principally built upon the ſtatutes which were then enacted. It is true the two laſt of them are apparently repealed; but many of their proviſions are re-enacted, with the addition of ſome new regulations, by the preſent militia laws; the general ſcheme of which is to diſcipline a certain number of the inhabitants of every county, choſen by lot for *three* years (4), and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commiſſion from the crown. They are not compellable to march out of their counties, unleſs in caſe of invaſion or actual rebellion within the realm, (or any of it's dominions or territories [p],) nor in any caſe compellable to march out of the kingdom (5). They are to be exerciſed at ſtated times: and their diſcipline in general is liberal and eaſy; but when drawn out into actual ſervice, they are ſubject to the rigours of martial law, as neceſſary to keep them in order. This is the conſtitutional ſecurity, which our laws [q] have provided

[o] 13 Car. II. c. 6. 14 Car. II. c. 3. 15 Car. II. c. 4.

[p] Stat. 16 Geo. III. c. 3.

[q] 2 Geo. III. c. 20. 9 Geo. III. c. 42. 16 Geo. III. c. 3. 18 Geo. III. c. 14. & 59. 19 Geo. III. c. 72.

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(4) And now for five years by the 26 Geo. III. c. 107. ſ. 24. which has reduced into one act the former ſtatutes relating to the militia.

(5) By 26 Geo. III. c. 107. ſ. 95. in all caſes of actual invaſion or upon imminent danger thereof, and in all caſes of rebellion or inſurrection, it ſhall be lawful for his majeſty, the occaſion being firſt communicated to parliament, if ſitting, if not ſitting, declared in council, and notified by proclamation, to order the militia to be embodied, and to direct them to be led by their reſpective officers into any parts of this kingdom; but neither the whole, or any part, ſhall be ordered to go out of Great Britain. See the regulations reſpecting the militia, ſtated at large in *Burn*, tit. *Militia*.

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for the public peace, and for protecting the realm againſt foreign or domeſtic violence.

WHEN the nation was engaged in war, more veteran troops and more regular diſcipline were eſteemed to be neceſſary, than could be expected from a mere militia. And therefore at ſuch times more rigorous methods were put in uſe for the raiſing of armies and the due regulation and diſcipline of the [413] ſoldiery: which are to be looked upon only as temporary excreſcences bred out of the diſtemper of the ſtate, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no ſettled principles, but is entirely arbitrary in it's deciſions, is, as ſir Matthew Hale obſerves [q], in truth and reality no law, but ſomething indulged rather than allowed as a law. The neceſſity of order and diſcipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all perſons to receive juſtice according to the laws of the land. Wherefore Thomas earl of Lancaſter being condemned at Pontefract, 15 Edw. II, by martial law, his attainder was reverſed 1 Edw. III, becauſe it was done in time of peace [r]. And it is laid down [s], that if a lieutenant, or other, that hath commiſſion of martial authority, doth in time of peace hang or otherwiſe execute any man by colour of martial law, this is murder; for it is againſt *magna carta* [t]. The petition of right [u] moreover enacts, that no ſoldier ſhall be quartered on the ſubject without his own conſent [v]; and that no commiſſion ſhall iſſue to proceed within this land according to martial law. And whereas, after the reſtoration, king Charles the ſecond kept up about five thouſand regular troops, by his own authority, for guards and garriſons; which king James the ſecond by degrees increaſed to no leſs than thirty thouſand, all paid from his own civil liſt; it was made one of the

[q] Hiſt. C. L. c. 2.
[r] 2 Brad. Append. 59.
[s] 3 Inſt. 52.
[t] *cap.* 29.
[u] 3 Car. I. See alſo Stat. 31 Car. II. c. 1.
[v] Thus, in Poland, no ſoldier can be quartered upon the gentry, the only freemen in that republic. Mod. Univ. Hiſt. xxxiv. 23.

articles of the bill of rights [v], that the raiſing and keeping a ſtanding army within the kingdom in time of peace, unleſs it be with conſent of parliament, is againſt law.

BUT, as the faſhion of keeping ſtanding armies (which was firſt introduced by Charles VII in France, *A. D.* [414] 1445 [w]) has of late years univerſally prevailed over Europe, (though ſome of it's potentates, being unable themſelves to maintain them, are obliged to have recourſe to richer powers, and receive ſubſidiary penſions for that purpoſe,) it has alſo for many years paſt been annually judged neceſſary by our legiſlature, for the ſafety of the kingdom, the defence of the poſſeſſions of the crown of Great Britain, and the preſervation of the balance of power in Europe, to maintain even in time of peace a ſtanding body of troops, under the command of the crown; who are however *ipſo facto* diſbanded at the expiration of every year, unleſs continued by parliament. And it was enacted by ſtatute 10 W. III. c. 1. that not more than twelve thouſand regular forces ſhould be kept on foot in Ireland, though paid at the charge of that kingdom; which permiſſion is extended by ſtatute 8 Geo. III. c. 13. to 16235 men in time of peace.

To prevent the executive power from being able to oppreſs, ſays baron Monteſquieu [x], it is requiſite that the armies with which it is entruſted ſhould conſiſt of the people, and have the ſame ſpirit with the people; as was the caſe at Rome, till Marius new-modelled the legions by enliſting the rabble of Italy, and laid the foundation of all the military tyranny that enſued. Nothing then, according to theſe principles, ought to be more guarded againſt in a free ſtate, than making the military power, when ſuch a one is neceſſary to be kept on foot, a body too diſtinct from the people. Like ours, it ſhould wholly be compoſed of natural ſubjects; it ought only to be enliſted for a ſhort and limited time; the ſoldiers alſo ſhould live intermixed with the people; no ſepa-

[v] Stat. 1 W. & M. ſt. 2. c. 2.
[w] Robertſon, Cha. V. i. 94.
[x] Sp. L. 11. 6.

rate

rate camp, no barracks, no inland fortreſſes ſhould be allowed (6). And perhaps it might be ſtill better, if, by diſmiſſing a ſtated number and enliſting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the ſoldier be more intimately connected together.

To keep this body of troops in order, an annual act of parliament likewiſe paſſes, "to puniſh mutiny and deſertion, "and for the better payment of the army and their quarters." [415] This regulates the manner in which they are to be diſperſed among the ſeveral inn-keepers and victuallers throughout the kingdom; and eſtabliſhes a law martial for their government. By this, among other things, it is enacted, that if any officer or ſoldier ſhall excite, or join any mutiny, or, knowing of it, ſhall not give notice to the commanding officer; or ſhall deſert, or liſt in any other regiment, or ſleep upon his poſt, or leave it before he is relieved, or hold correſpondence with a rebel or enemy, or ſtrike or uſe violence to his ſuperior officer, or ſhall diſobey his lawful commands: ſuch offender ſhall ſuffer ſuch puniſhment as a court martial ſhall inflict, though it extend to death itſelf.

HOWEVER expedient the moſt ſtrict regulations may be in time of actual war, yet in times of profound peace, a little relaxation of military rigour would not, one ſhould hope, be productive of much inconvenience. And, upon this principle, though by our ſtanding laws [y] (ſtill remaining in force, though not attended to) deſertion in time of war is made

[y] Stat. 18 Hen. VI. c. 19. 2 & 3 Edw. VI. c. 2.

(6) Since this was written, with a genuine love of liberty, by the author, experience has proved, that the moſt formidable enemy which the people of England have to dread, is their own lawleſs mobs. Care ought therefore to be taken, that ſoldiers may never become familiar with the people in great towns, leſt they ſhould be more inclined to join, than to quell, a riot. *Nam neque quies gentium ſine armis, neque arma ſine ſtipendiis, neque ſtipendia ſine tributis, haberi queunt.* Tac. Hiſt. iv. c. 74.

felony, without benefit of clergy, and the offence is triable by a jury and before juſtices at the common law: yet, by our militia-laws before mentioned, a much lighter puniſhment is inflicted for deſertion in time of peace. So, by the Roman law alſo, deſertion in time of war was puniſhed with death, but more mildly in time of tranquillity [z]. But our mutiny act makes no ſuch diſtinction: for any of the faults above-mentioned are, equally at all times, puniſhable with death itſelf, if a court martial ſhall think proper. This diſcretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almoſt an abſolute legiſlative power [a]. "His "majeſty, ſays the act, may form articles of war, and conſti-"tute courts martial, with power to try any crime by ſuch "articles, and inflict penalties by ſentence or judgment of "the ſame." A vaſt and moſt important truſt! an unlimited power to create crimes, and annex to them any puniſhments,
[416] not extending to life or limb! Theſe are indeed forbidden to be inflicted, except for crimes declared to be ſo puniſhable by this act; which crimes we have juſt enumerated, and, among which, we may obſerve that any diſobedience to lawful commands is one. Perhaps in ſome future reviſion of this act, which is in many reſpects haſtily penned, it may be thought worthy the wiſdom of parliament to aſcertain the limits of military ſubjection, and to enact expreſs articles of war for the government of the army, as is done for the government of the navy: eſpecially as, by our preſent conſtitution, the nobility and gentry of the kingdom, who ſerve their country as militia officers, are annually ſubjected to the ſame arbitrary rule, during their time of exerciſe.

ONE of the greateſt advantages of our Engliſh law is, that not only the crimes themſelves which it puniſhes, but alſo the penalties which it inflicts, are aſcertained and notorious: nothing is left to arbitrary diſcretion: the king by his judges diſpenſes what the law has previouſly ordained; but is not

[z] *Ff.* 49. 16. 5.

[a] A like power over the marines is given to the lords of the admiralty, by another annual act "for the regulation "of his majeſty's marine forces while "on ſhore."

himſelf

himſelf the legiſlator. How much therefore is it to be regretted that a ſet of men, whoſe bravery has ſo often preſerved the liberties of their country, ſhould be reduced to a ſtate of ſervitude in the midſt of a nation of freemen! for ſir Edward Coke will inform us [a], that it is one of the genuine marks of ſervitude, to have the law, which is our rule of action, either concealed or precarious: "*miſera eſt ſervitus* "*ubi jus eſt vagum aut incognitum.*" Nor is this ſtate of ſervitude quite conſiſtent with the maxims of ſound policy obſerved by other free nations. For, the greater the general liberty is which any ſtate enjoys, the more cautious has it uſually been in introducing ſlavery in any particular order or profeſſion. Theſe men, as baron Monteſquieu obſerves [b], ſeeing the liberty which others poſſeſs, and which they themſelves are excluded from, are apt (like eunuchs in the eaſtern ſeraglios) to live in a ſtate of perpetual envy and hatred towards the reſt of the community; and indulge a malignant pleaſure in contributing to deſtroy thoſe privileges, to which they can never be admitted. Hence have many free ſtates, by departing from this rule, been endangered by the revolt of their ſlaves: while, in abſolute and deſpotic governments [417] where no real liberty exiſts, and conſequently no invidious compariſons can be formed, ſuch incidents are extremely rare. Two precautions are therefore adviſed to be obſerved in all prudent and free governments: 1. To prevent the introduction of ſlavery at all: or, 2. If it be already introduced, not to intruſt thoſe ſlaves with arms; who will then find themſelves an overmatch for the freemen. Much leſs ought the ſoldiery to be an exception to the people in general, and the only ſtate of ſervitude in the nation.

BUT as ſoldiers, by this annual act, are thus put in a worſe condition than any other ſubjects, ſo by the humanity of our ſtanding laws, they are in ſome caſes put in a much better. By ſtatute 43 Eliz. c. 3. a weekly allowance is to be raiſed in every county for the relief of ſoldiers that are ſick, hurt,

[a] 4 Inſt. 332. [b] Sp. L. 15. 12.

and maimed: not forgetting the royal hoſpital at Chelſea, for ſuch as are worn out in their duty. Officers and ſoldiers, that have been in the king's ſervice, are by ſeveral ſtatutes, enacted at the cloſe of ſeveral wars, at liberty to uſe any trade or occupation they are fit for, in any town in the kingdom, (except the two univerſities,) notwithſtanding any ſtatute, cuſtom, or charter to the contrary (7). And ſoldiers in actual military ſervice may make nuncupative wills, and diſpoſe of their goods, wages, and other perſonal chattels, without thoſe forms, ſolemnities, and expenſes, which the law requires in other caſes [c]. Our law does not indeed extend this privilege ſo far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a ſoldier, in the article of death, wrote any thing in bloody letters on his ſhield, or in the duſt of the field with his ſword, it was a very good military teſtament [d]. And thus much for the military ſtate, as acknowleged by the laws of England (8).

[c] Stat 29 Car. II. c. 3. 5 W. III. c. 21. § 6.

[d] *Si milites quid in clypeo literis ſanguine ſuo rutilantibus adnotaverint, aut in pulvere inſcripſerint gladio ſuo, ipſo tempore quo, in praelio, vitiae ſortem derelinquunt, hujuſmodi voluntatem ſtabilem eſſe oportet.* Cod 6. 21. 15.

(7) By the 24 Geo. III. ſeſſ. 2. c. 6. all officers, ſoldiers, and mariners, who have been employed in the king's ſervice ſince 1763, and have not deſerted, and their wives and children, may exerciſe any trade in any town in the kingdom without exception, and ſhall not be removed till they are actually chargeable. The ſame privilege is extended to all officers and ſoldiers who have been drawn by ballot, and have been honourably diſcharged, after three years actual ſervice in the militia.

But the employment of a huſbandman is not a trade, and therefore he may be removed before he is chargeable. 3 *T. R.* 133.

(8) It is now fully eſtabliſhed, that both the full pay and half pay of an officer, or any perſon in a military or naval character, cannot in any inſtance be aſſigned before it is due; as the object of ſuch pay is to enable thoſe who receive it always to be ready to ſerve their country with that decency and dignity which their reſpective characters and ſtations require. 4 *T. R.* 258. *H. Bl.* 628.

THE

THE *maritime* ſtate is nearly related to the former: though much more agreeable to the principles of our free conſtitution. The royal navy of England hath ever been it's greateſt [418] defence and ornament; it is it's antient and natural ſtrength; the floating bulwark of the iſland; an army, from which, however ſtrong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been aſſiduouſly cultivated, even from the earlieſt ages. To ſo much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and ſubſtruction of all their marine conſtitutions, was confeſſedly compiled by our king Richard the firſt, at the iſle of Oleron on the coaſt of France, then part of the poſſeſſions of the crown of England[e]. And yet, ſo vaſtly inferior were our anceſtors in this point to the preſent age, that even in the maritime reign of queen Elizabeth ſir Edward Coke[f] thinks it matter of boaſt, that the royal navy of England then conſiſted of *three and thirty* ſhips. The preſent condition of our marine is in great meaſure owing to the ſalutary proviſions of the ſtatutes, called the navigation acts; whereby the conſtant increaſe of Engliſh ſhipping and ſeamen was not only encouraged, but rendered unavoidably neceſſary. By the ſtatute 5 Ric. II. c. 3. in order to augment the navy of England, then greatly diminiſhed, it was ordained, that none of the king's liege people ſhould ſhip any merchandize out of or into the realm but only in ſhips of the king's ligeance, on pain of forfeiture. In the next year, by ſtatute 6 Ric. II. c. 8. this wiſe proviſion was enervated, by only obliging the merchants to give Engliſh ſhips (if able and ſufficient) the preference. But the moſt beneficial ſtatute for the trade and commerce of theſe kingdoms is that navigation-act, the rudiments of which were firſt framed in 1650[g], with a narrow partial view: being intended to mortify our own ſugar iſlands, which were diſaffected to the parliament and ſtill held out for Charles II, by ſtopping the gainful trade which they then carried on with the

[e] 4 Inſt. 144. *Coutumes de la mer.* 2.
[f] 4 Inſt. 50.
[g] Scobell. 132.

Dutch;

Dutch[h]; and at the ſame time to clip the wings of thoſe our opulent and aſpiring neighbours. This prohibited all ſhips of foreign nations from trading with any Engliſh plantations
[419] without licence from the council of ſtate. In 1651[i] the prohibition was extended alſo to the mother country: and no goods were ſuffered to be imported into England, or any of it's dependencies, in any other than Engliſh bottoms; or in the ſhips of that European nation, of which the merchandize imported was the genuine growth or manufacture(9). At the reſtoration, the former proviſions were continued, by ſtatute 12 Car. II. c. 18. with this very material improvement, that the maſter and three-fourths of the mariners ſhall alſo be Engliſh ſubjects(10).

MANY laws have been made for the ſupply of the royal navy with ſeamen; for their regulation when on board; and to confer privileges and rewards on them during and after their ſervice.

1. FIRST, for their ſupply. The power of impreſſing ſeafaring men for the ſea ſervice by the king's commiſſion, has

[h] Mod. Un. Hiſt. xli 289. [i] Scobell. 176.

(9) By the 26 Geo. III. c. 60. No privileges are to be allowed to any ſhips which are not Britiſh-built, or built in ſome part of his majeſty's dominions: and every ſuch ſhip muſt be regiſtered in the port to which ſhe belongs, according to the directions of that ſtatute, the 27 Geo. III. c. 19. and the 34 Geo. III. c. 68.

(10) The 34 Geo. III. c. 68. enacts that after the expiration of ſix months from the concluſion of the preſent war, no goods or merchandize ſhall be imported into, or exported from, the kingdom of Great Britain, or the iſlands of Guernſey, Jerſey, Alderney, Sark, or Man, on board any ſhip, which is not navigated by a maſter and three-fourths, at leaſt, of the mariners Britiſh ſubjects.

And ſhips or veſſels ſailing from one place to another within the kingdom, or in the aforeſaid iſlands, muſt be manned wholly with Britiſh ſubjects.

The wilful violation of theſe regulations ſubjects the owners to a forfeiture of the ſhip and all the goods on board.

been a matter of ſome diſpute, and ſubmitted to with great reluctance; though it hath very clearly and learnedly been ſhewn, by ſir Michael Foſter[j], that the practice of impreſſing, and granting powers to the admiralty for that purpoſe, is of very antient date, and hath been uniformly continued by a regular ſeries of precedents to the preſent time: whence he concludes it to be part of the common law[k]. The difficulty ariſes from hence, that no ſtatute has expreſsly declared this power to be in the crown, though many of them very ſtrongly imply it. The ſtatute 2 Ric. II. c. 4. ſpeaks of mariners being arreſted and retained for the king's ſervice, as of a thing well known and practiſed without diſpute; and provides a remedy againſt their running away. By a later ſtatute[l], if any waterman, who uſes the river Thames, ſhall hide himſelf during the execution of any commiſſion of preſſing for the king's ſervice, he is liable to heavy penalties. By another[m], no fiſherman ſhall be taken by the queen's commiſſion to ſerve as a mariner; but the commiſſion ſhall be firſt brought to two juſtices of the peace, inhabiting near the ſea coaſt where the mariners are to be taken, to the intent that the juſtices may [420] chuſe out and return ſuch a number of able-bodied men, as in the commiſſion are contained, to ſerve her majeſty. And, by others[n], eſpecial protections are allowed to ſeamen in particular circumſtances, to prevent them from being impreſſed. And ferrymen are alſo ſaid to be privileged from being impreſſed, at common law[o]. All which do moſt evidently imply a power of impreſſing to reſide ſomewhere; and, if any where, it muſt from the ſpirit of our conſtitution, as well as from the frequent mention of the king's commiſſion, reſide in the crown alone (11).

j Rep. 154.
k See alſo Comb. 245. Barr. 334.
l Stat. 2 & 3 Ph. & M. c. 16.
m Stat. 5 Eliz. c. 5.
n See Stat. 7 & 8 W. III. c. 21. 2 Ann. c. 6. 4 & 5 Ann. c. 19. 13 Geo. II. c. 17. 2 Geo. III. c. 15. 11 Geo. III. c. 38. 19 Geo. III. c. 75, &c.
o Sav. 14.

(11) The legality of preſſing is ſo fully eſtabliſhed, that it will not now admit of a doubt in any court of juſtice. In the caſe of the King *v.* Jubbs, lord Mansfield ſays, "the power of preſſing "is

BUT, beſides this method of impreſſing, (which is only defenſible from public neceſſity, to which all private conſiderations muſt give way,) there are other ways that tend to the increaſe of ſeamen, and manning the royal navy. Pariſhes may bind out poor boys apprentices to maſters of merchantmen, who ſhall be protected from impreſſing for the firſt three years; and if they are impreſſed afterwards, the maſters ſhall be allowed their wages[p]: great advantages in point of wages are given to volunteer ſeamen in order to induce them to enter into his majeſty's ſervice[q]: and every foreign ſeaman, who during a war ſhall ſerve two years in any man of war, merchantman, or privateer, is naturalized *ipſo facto*[r]. About the middle of king William's reign a ſcheme was ſet on foot[s] for a regiſter of ſeamen to the number of thirty thouſand, for a conſtant and regular ſupply of the king's fleet; with great privileges to the regiſtered men, and, on the other hand, heavy penalties in caſe of their non-appearance when called for: but this regiſtry, being judged to be ineffectual as well as oppreſſive, was aboliſhed by ſtatute 9 Ann. c. 21.

[p] Stat. 2 Ann. c. 6.
[q] Stat. 31 Geo. II. c. 10.
[r] Stat. 13 Geo. II. c. 3.
[s] Stat. 7 & 8 W. III. c. 21.

"is founded upon immemorial uſage, allowed for ages. If it be "ſo founded and allowed for ages, it can have no ground to ſtand "upon; nor can it be vindicated or juſtified by any reaſon but "the ſafety of the ſtate. And the practice is deduced from that "true maxim of the conſtitutional law of England, 'that private "miſchief had better be ſubmitted to, than public detriment and "inconvenience ſhould enſue.' And though it be a legal power, "it may, like many others, be abuſed in the exerciſe of it." *Comp.* 517. In that caſe, the defendant was brought up by *habeas corpus*, upon the ground that he was entitled to an exemption; but the court held that the exemption was not made out, and he was remanded to the ſhip from which he had been brought.

Lord Kenyon has alſo declared in a ſimilar caſe, that the right of preſſing is founded on the common law, and extends to all perſons exerciſing employments in the ſeafaring line. Any exemptions, therefore, which ſuch perſons may claim, muſt depend upon the poſitive proviſions of ſtatutes. 5 *T. R.* 276.

2. THE

2. THE method of ordering ſeamen in the royal fleet, and keeping up a regular diſcipline there, is directed by certain expreſs rules, articles, and orders, firſt enacted by the authority of parliament ſoon after the reſtoration [t]; but ſince new-modelled and altered, after the peace of Aix la Chapelle [u], to remedy ſome defects which were of fatal conſequence in conducting the preceding war. In theſe articles of the navy almoſt every poſſible offence is ſet down, and the puniſhment thereof annexed: in which reſpect the ſeamen have much the advantage over their brethren in the land ſervice; whoſe articles of war are not enacted by parliament, but framed from time to time at the pleaſure of the crown. Yet from whence this diſtinction aroſe, and why the executive power, which is limited ſo properly with regard to the navy, ſhould be ſo extenſive with regard to the army, it is hard to aſſign a reaſon: unleſs it proceeded from the perpetual eſtabliſhment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which ſubſiſted only from year to year, and might therefore with leſs danger be ſubjected to diſcretionary government. But, whatever was apprehended at the firſt formation of the mutiny act, the regular renewal of our ſtanding force at the entrance of every year has made this diſtinction idle. For, if from experience paſt we may judge of future events, the army is now laſtingly ingrafted into the Britiſh conſtitution; with this ſingularly fortunate circumſtance, that any branch of the legiſlature may annually put an end to it's legal exiſtence, by refuſing to concur in it's continuance. [421]

3. WITH regard to the privileges conferred on ſailors, they are pretty much the ſame with thoſe conferred on ſoldiers; with regard to relief when maimed, or wounded, or ſuperannuated, either by county rates, or the royal hoſpital at Greenwich; with regard alſo to the exerciſe of trades, and the power of making nuncupative teſtaments: and farther [v], no ſeaman aboard his majeſty's ſhips can be arreſted

[t] Stat. 13 Car. II. ſt. 1. c. 9.
[u] Stat. 22 Geo. II. c. 23. amended by 19 Geo. III. c. 17.
[v] Stat. 31 Geo. II. c. 10.

for

In diſcuſſing the relation of *maſter* and *ſervant*, I ſhall, firſt, conſider the ſeveral ſorts of ſervants, and how this relation is created and deſtroyed: ſecondly, the effect of this relation with regard to the parties themſelves: and, laſtly, it's effect with regard to other perſons.

I. As to the ſeveral ſorts of ſervants: I have formerly obſerved[a] that pure and proper ſlavery does not, nay cannot, ſubſiſt in England: ſuch I mean, whereby an abſolute and unlimited power is given to the maſter over the life and fortune of the ſlave. And indeed it is repugnant to reaſon, and the principles of natural law, that ſuch a ſtate ſhould ſubſiſt any where. The three origins of the right of ſlavery, aſſigned by Juſtinian[b], are all of them built upon falſe foundations[c]. As, firſt, ſlavery is held to ariſe "*jure gentium*," from a ſtate of captivity in war; whence ſlaves are called *mancipia, quaſi manu capti*. The conqueror, ſay the civilians, had a right to the life of his captive; and, having ſpared that, has a right to deal with him as he pleaſes. But it is an untrue poſition, when taken generally, that by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular caſes; in caſes of abſolute neceſſity, for ſelf-defence; and it is plain this abſolute neceſſity did not ſubſiſt, ſince the victor did not actually kill him, but made him priſoner. War is itſelf juſtifiable only on principles of ſelf-preſervation; and therefore it gives no other right over priſoners but merely to diſable them from doing harm to us, by confining their perſons: much leſs can it give a right to kill, torture, abuſe, plunder, or even to enſlave, an enemy, when the war is over. Since therefore the right of *making* ſlaves by captivity depends on a ſuppoſed right of ſlaughter, that foundation failing, the conſequence drawn from it muſt fail likewiſe. But, ſecondly, it is ſaid that ſlavery may begin "*jure civili*;" when one man ſells himſelf to another. This, if only meant of contracts to ſerve or work for another, is very

[a] Pag. 127.

[b] *Servi aut fiunt, aut naſcuntur: fiunt jure gentium, aut jure civili: naſcuntur ex ancillis noſtris. Inſt.* 1. 3. 4.

[c] Monteſq. Sp. L. xv. 2.

juſt: but when applied to ſtrict ſlavery, in the ſenſe of the laws of old Rome or modern Barbary, is alſo impoſſible. Every ſale implies a price, a *quid pro quo*, an equivalent given to the ſeller in lieu of what he tranſfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in abſolute ſlavery) are held to be in the maſter's diſpoſal? His property alſo, the very price he ſeems to receive, devolves *ipſo facto* to his maſter, the inſtant he becomes his ſlave. In this caſe therefore the buyer gives nothing, and the ſeller receives nothing: of what validity then can a ſale be, which deſtroys the very principles upon which all ſales are founded? Laſtly, we are told, that beſides theſe two ways by which ſlaves "*fiunt*," or are acquired, they may alſo be hereditary: "*ſervi naſcuntur*;" the children of acquired ſlaves are *jure naturae*, by a negative kind of birthright, ſlaves alſo. But this, being built on the two former rights, muſt fall together with them. If neither captivity, nor the ſale of one's ſelf, can by the law of nature and reaſon reduce the parent to ſlavery, much leſs can they reduce the offſpring.

UPON theſe principles the law of England abhors, and will not endure the exiſtence of, ſlavery within this nation: ſo that when an attempt was made to introduce it, by ſtatute 1 Edw. VI. c. 3. which ordained, that all idle vagabonds ſhould be made ſlaves, and fed upon bread and water, or ſmall drink, and refuſe meat; ſhould wear a ring of iron round their necks, arms, or legs; and ſhould be compelled by beating, chaining, or otherwiſe, to perform the work aſſigned them, were it never ſo vile; the ſpirit of the nation could not brook this condition, even in the moſt abandoned rogues; and therefore this ſtatute was repealed in two years afterwards [d]. And now it is laid down [e], that a ſlave or negro, the inſtant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his perſon, and his property. Yet, with regard to any right which the maſter may have lawfully acquired to the perpetual ſervice of John or Thomas, this will remain exactly in the ſame ſtate as be-

[d] Stat. 3 & 4 Edw. VI. c 16. [e] Salk. 666.

fore: for this is no more than the ſame ſtate of ſubjection for life, which every apprentice ſubmits to for the ſpace of ſeven years, or ſometimes for a longer term(1). Hence too it follows, that the infamous and unchriſtian practice of withholding baptiſm from negro ſervants, leſt they ſhould thereby gain their liberty, is totally without foundation, as well as without excuſe. The law of England acts upon general and extenſive principles: it gives liberty, rightly underſtood, that is, protection to a jew, a turk, or a heathen, as well as to thoſe who profeſs the true religion of Chriſt; and it will not diſſolve a civil obligation between maſter and ſervant, on account of the alteration of faith in either of the parties: but the ſlave is entitled to the ſame protection in England before, as after, baptiſm: and, whatever ſervice the heathen negro owed of right to his American maſter, by general not by local law, the ſame (whatever it be) is he bound to render when brought to England and made a chriſtian (2).

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(1) The meaning of this ſentence is not very intelligible. If a right to perpetual ſervice can be acquired lawfully at all, it muſt be acquired by a contract with one who is free, who is *ſui juris*, and competent to contract. Such a hiring may not perhaps be illegal and void. If a man can contract to ſerve for one year, there ſeems to be no reaſon to prevent his contracting to ſerve for 100 years, if he ſhould ſo long live: though, in general, the courts would be inclined to conſider it an improvident engagement, and would not be very ſtrict in enforcing it. But there could be no doubt, but ſuch a contract with a perſon in a ſtate of ſlavery would be abſolutely null and void.

(2) We might have been ſurpriſed, that the learned Commentator ſhould condeſcend to treat this ridiculous notion and practice with ſo much ſerioufneſs, if we were not apprized, that the court of common pleas, ſo late as the 5 W. & M. held, that a man might have a property in a negro boy, and might bring an action of trover for him, *becauſe negroes are heathens*. 1 *Ld. Ray.* 147. A ſtrange principle to found a right of property upon!

But it was decided in 1772, in the celebrated caſe of James Somerſett, that a heathen negro, when brought to England, owes no ſervice to an American or any other maſter. James Somerſett had

1. THE firſt ſort of ſervants therefore, acknowleged by the laws of England, are *menial ſervants;* ſo called from being *intra moenia*, or domeſtics. The contract between them and their maſters ariſes upon the hiring. If the hiring be general without any particular time limited, the law conſtrues it to be a hiring for a year[f]; upon a principle of natural equity, that the ſervant ſhall ſerve, and the maſter maintain him, throughout all the revolutions of the reſpective ſeaſons; as well when there is work to be done, as when there is not[g]: but the contract may be made for any larger or ſmaller term. All ſingle men between twelve years old and ſixty, and married

[f] Co. Litt. 42. [g] F. N. B. 168.

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had been made a ſlave in Africa, and was ſold there; from thence he was carried to Virginia, where he was bought, and brought by his maſter to England; here he ran away from his maſter, who ſeized him, and carried him on board a ſhip, where he was confined, in order to be ſent to Jamaica to be ſold as a ſlave. Whilſt he was thus confined, Lord Mansfield granted a *habeas corpus*, ordering the captain of the ſhip to bring up the body of James Somerſett, with the cauſe of his detainer. The above-mentioned circumſtances being ſtated upon the return to the writ, after much learned diſcuſſion in the court of king's bench, the court were unanimouſly of opinion, that the return was inſufficient, and that Somerſett ought to be diſcharged. See Mr. Hargrave's learned argument for the negro in 11 *St. Tr.* 340; and the caſe reported in *Loft's Reports*, 1. In conſequence of this deciſion, if a ſhip loaden with ſlaves was obliged to put into an Engliſh harbour, all the ſlaves on board might and ought to be ſet at liberty. Though there are acts of parliament which recognize and regulate the ſlavery of negroes, yet it exiſts not in the contemplation of the common law; and the reaſon that they are not declared free before they reach an Engliſh harbour, is only becauſe their complaints cannot ſooner be heard and redreſſed by the proceſs of an Engliſh court of juſtice.

Liberty by the Engliſh law depends not upon the complexion; and what was ſaid even in the time of queen Elizabeth, is now ſubſtantially true, that the air of England is too pure for a ſlave to breathe in. 2 *Ruſhw.* 468.

ones under thirty years of age, and all ſingle women between twelve and forty, not having any viſible livelihood, are compellable by two juſtices to go out to ſervice in huſbandry or certain ſpecific trades, for the promotion of honeſt induſtry: and no maſter can put away his ſervant, or ſervant leave his maſter, after being ſo retained, either before or at the end of
[426] his term, without a quarter's warning; unleſs upon reaſonable cauſe to be allowed by a juſtice of the peace[h] (3): but they may part by conſent, or make a ſpecial bargain.

2. ANOTHER ſpecies of ſervants are called *apprentices*, (from *apprendre*, to learn,) and are uſually bound for a term of years, by deed indented or indentures, to ſerve their maſters, and be maintained and inſtructed by them. This is uſually done to perſons of trade, in order to learn their art and myſtery; and ſometimes very large ſums are given with them, as a premium for ſuch their inſtruction: but it may be done to huſbandmen, nay to gentlemen, and others. And[i] children of poor perſons may be apprenticed out by the overſeers, with conſent of two juſtices, till twenty-one years of age, to ſuch perſons as are thought fitting; who are alſo compellable to take them; and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to ſuch compulſion[k] (4): for which purpoſes our ſtatutes have made the in-

[h] Stat. 5 Eliz. c. 4.
[i] Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. 1 Jac. I. c. 25. 7 Jac. I. c. 3. 8 & 9 W. & M. c. 30. 2 & 3 Ann. c. 6. 4 Ann. c. 19. 17 G. II. c. 5. 18 G. III. c. 47.
[k] Salk. 57. 491.

(3) But this relates only to ſervants employed in huſbandry. It had been the practice for magiſtrates to exerciſe a juriſdiction over domeſtic ſervants, and it would be very uſeful to the public, that they ſhould poſſeſs ſuch a juriſdiction; but it has lately been decided, that their authority, under the 5 Eliz. c. 4. is confined to ſervants employed in huſbandry. 6 *T. R.* 583. But it has been held that a maſter may turn away a ſervant for incontinence, or moral turpitude, for ſuch miſconduct produces a diſſolution of the contract. *Cald.* 14.

(4) The pariſh officers, with the aſſent of two juſtices, may bind a pariſh apprentice to a perſon who reſides out of their pariſh, if he occupies an eſtate in the pariſh. 3 *T. R.* 107.

dentures obligatory, even though ſuch pariſh-apprentice be a minor[l]. Apprentices to trades may be diſcharged on reaſonable cauſe, either at the requeſt of themſelves or maſters, at the quarter-ſeſſions, or by one juſtice, with appeal to the ſeſſions[m]; who may, by the equity of the ſtatute, if they think it reaſonable, direct reſtitution of a ratable ſhare of the money given with the apprentice[n]: and pariſh-apprentices may be diſcharged in the ſame manner, by two juſtices[o] (5). But if an apprentice, with whom leſs than ten pounds hath been given, runs away from his maſter, he is compellable to ſerve out his time of abſence, or make ſatisfaction for the ſame, at any time within ſeven years after the expiration of his original contract[p].

3. A THIRD ſpecies of ſervants are *labourers*, who are only hired by the day or the week, and do not live *intra moenia*, as part of the family; concerning whom the ſtatutes before [427] cited[q] have made many very good regulations: 1. Directing that all perſons who have no viſible effects may be compelled to work: 2. Defining how long they muſt continue at work

[l] Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.
[m] Stat. 5 Eliz. c. 4.
[n] Salk. 67.
[o] Stat. 20 Geo. II. c. 19.
[p] Stat. 6 Geo. III. c. 26.
[q] Stat. 5 Eliz. c. 4. 6 Geo. III. c. 26.

(5) By 32 Geo. III. c. 57. where a pariſh apprentice is diſcharged from a maſter on account of the miſconduct of the maſter, the juſtices may order the maſter to deliver up his clothes, and to pay a ſum not exceeding 10*l.* to place him with another maſter. See the other proviſions of this ſtatute, and the ſubject ſtated at large, in *Burn*, tit. *Apprentice*.

And by the 33 Geo. III. c. 55. wherever a maſter or miſtreſs has not received more than ten pounds with an apprentice, two or more juſtices at a ſpecial or petty ſeſſions may, upon complaint and proof of ill-uſage of the apprentice, fine the maſter or miſtreſs any ſum not exceeding forty ſhillings; and the fine may, at the diſcretion of the juſtices, be applied to the uſe of the apprentice, as a compenſation for the injury which he may have ſuſtained.

in ſummer and in winter: 3. Puniſhing ſuch as leave or deſert their work: 4. Empowering the juſtices at ſeſſions, or the ſheriff of the county, to ſettle their wages: and 5. Inflicting penalties on ſuch as either give, or exact, more wages than are ſo ſettled.

4. THERE is yet a fourth ſpecies of ſervants, if they may be ſo called, being rather in a ſuperior, a miniſterial, capacity; ſuch as *ſtewards*, *factors*, and *bailiffs*: whom however the law conſiders as ſervants *pro tempore*, with regard to ſuch of their acts as affect their maſter's or employer's property. Which leads me to conſider,

II. THE manner in which this relation, of ſervice, affects either the maſter or ſervant. And, firſt, by hiring and ſervice for a year, or apprenticeſhip under indentures, a perſon gains a ſettlement in that pariſh wherein he laſt ſerved forty days [r]. In the next place perſons, ſerving ſeven years as apprentices to any trade, have an exclusive right to exerciſe that trade in any part of England [s]. This law, with regard to the excluſive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times: which has occaſioned a great variety of reſolutions in the courts of law concerning it; and attempts have been frequently made for it's repeal, though hitherto without ſucceſs. At common law every man might uſe what trade he pleaſed; but this ſtatute reſtrains that liberty to ſuch as have ſerved as apprentices: the adverſaries to which proviſion ſay, that all reſtrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it allege, that unſkilfulneſs in trades is equally detrimental to the public, as monopolies. This reaſon indeed only extends to ſuch trades,
[428] in the exerciſe whereof ſkill is required: but another of their arguments goes much farther; *viz.* that apprenticeſhips are uſeful to the commonwealth, by employing of youth, and

[r] See page 364. [s] Stat. 5 Eliz. c. 4. § 31.

learning

learning them to be early induſtrious (6); but that no one would be induced to undergo a ſeven years ſervitude, if others, though equally ſkilful, were allowed the ſame advantages without having undergone the ſame diſcipline: and in this there ſeems to be much reaſon. However, the reſolutions of the courts have in general rather confined than extended the reſtriction. No trades are held to be within the ſtatute, but ſuch as were in being at the making of it [t]: for trading in a country village, apprenticeſhips are not requiſite [u]: and following the trade ſeven years, without any effectual proſecution, (either as a maſter or a ſervant,) is ſufficient without an actual apprenticeſhip [w] (7).

A MASTER may by law correct his apprentice for negligence or other miſbehaviour, ſo it be done with moderation [x]: though, if the maſter or maſter's wife beats any other ſervant of full age, it is good cauſe of departure [y] (8). But if any ſervant, workman, or labourer aſſaults his maſter or dame, he ſhall ſuffer one year's impriſonment, and other open corporal puniſhment, not extending to life or limb [z].

[t] Lord Raym. 514.
[u] 1 Ventr. 51. 2 Keb. 583.
[w] Lord Raym. 1179. Wallen *qui tam* v. Holton. Tr. 33 Geo. II. (by all the judges.)
[x] 1 Hawk. P. C. 130. Lamb. Eiren. 127. Cro. Car. 179. 2 Show. 289.
[y] F. N. B. 168. Bro. *Abr. t. Labourers* 51. *Treſpaſs* 349.
[z] Stat. 5 Eliz. c. 4.

(6) Lord Coke ſays, this ſtatute was not enacted only that workmen ſhould be ſkilful, but alſo that youth ſhould not be nouriſhed in idleneſs, but brought up and educated in lawful ſciences and trades. 11 *Co.* 54.

(7) The penalty is 40s. a month, one half to the king, the other half to the proſecutor. The words of the ſtatute are, *having ſerved as an apprentice*, and there can be no doubt but the legiſlature intended that the tradeſman ſhould have ſerved an actual apprenticeſhip; but from the words, *as an apprentice*, this being a penal ſtatute, the judges have determined that he ſerves as an apprentice, who for ſeven years has been working as a maſter. 2 *Wilſ.* 168; or as the maſter's wife. 1 *Barnard.* 367.

(8) Or rather of complaint to a magiſtrate to be diſcharged.

By ſervice all ſervants and labourers, except apprentices, become entitled to wages: according to their agreement, if menial ſervants; or according to the appointment of the ſheriff or ſeſſions, if labourers or ſervants in huſbandry: for the ſtatutes for regulation of wages extend to ſuch ſervants only [a]; it being impoſſible for any magiſtrate to be a judge of the employment of menial ſervants, or of courſe to aſſeſs their wages.

III. Let us, laſtly, ſee how ſtrangers may be affected by this relation of maſter and ſervant: or how a maſter may
[429] behave towards others on behalf of his ſervant; and what a ſervant may do on behalf of his maſter.

And, firſt, the maſter may *maintain*, that is, abet and aſſiſt his ſervant in any action at law againſt a ſtranger: whereas, in general, it is an offence againſt public juſtice to encourage ſuits and animoſities, by helping to bear the expence of them, and is called in law maintenance [b]. A maſter alſo may bring an action againſt any man for beating or maiming his ſervant: but in ſuch caſe he muſt aſſign, as a ſpecial reaſon for ſo doing, his own damage by the loſs of his ſervice (10); and this loſs muſt be proved upon the trial [c]. A maſter likewiſe may juſtify an aſſault in defence of his ſervant, and a ſervant in defence of his maſter [d]: the maſter, becauſe he has an intereſt in his ſervant, not to be deprived of his ſervice; the ſervant, becauſe it is part of his duty, for which he receives his wages, to ſtand by and defend his

[a] 2 Jones, 47.
[b] 2 Roll. Abr. 115.
[c] 9 Rep. 113.
[d] 2 Roll. Abr. 546.

(10) This is an action upon the caſe, generally called a *per quod ſervitium amiſit*. This action by a maſter for beating his ſervant, has been contrived, by a ſpecies of fiction, to be extended to a parent, to enable him to recover a pecuniary compenſation, under ſome circumſtances, for the ſeduction of his daughter. See 3 vol. p. 143. note.

maſter.

maſter [e]. Alſo if any perſon do hire or retain my ſervant, being in my ſervice, for which the ſervant departeth from me and goeth to ſerve the other, I may have an action for damages againſt both the new maſter and the ſervant, or either of them: but if the new maſter did not know that he is my ſervant, no action lies; unleſs he afterwards refuſe to reſtore him upon information and demand [f]. The reaſon and foundation upon which all this doctrine is built, ſeem to be the property that every man has in the ſervice of his domeſtics; acquired by the contract of hiring, and purchaſed by giving them wages.

As for thoſe things which a ſervant may do on behalf of his maſter, they ſeem all to proceed upon this principle, that the maſter is anſwerable for the act of his ſervant, if done by his command, either expreſsly given, or implied: *nam qui facit per alium, facit per ſe* [g]. Therefore, if the ſervant commit a treſpaſs by the command or encouragement of his maſter, the maſter ſhall be guilty of it, though the ſervant is not thereby excuſed, for he is only to obey his maſter in matters that are honeſt and lawful. If an innkeeper's ſervants rob his gueſts, the maſter is bound to reſtitution [h]: for as there is a confidence repoſed in him, that he will take care to provide honeſt ſervants, his negligence is a kind of implied conſent to the robbery (11); *nam, qui non prohibet, cum prohibere poſſit, jubet.* So likewiſe if the drawer at a tavern ſells a man bad wine, whereby his health is injured, he may bring an action againſt the maſter [i]: for although the maſter did not expreſsly order the ſervant to ſell it to that perſon in particu- [430]

[e] In like manner, by the laws of king Alfred, c. 38. a ſervant was allowed to fight for his maſter, a parent for his child, and a huſband or father for the chaſtity of his wife or daughter.

[f] N. N. B. 167, 168.

[g] 4 Inſt. 109.

[h] Noy's max. c. 43.

[i] 1 Roll. Abr. 95.

(11) But it has been long eſtabliſhed law, that the innkeeper is bound to reſtitution if the gueſt is robbed in his houſe by any perſon whatever; unleſs it ſhould appear that he was robbed by his own ſervant, or by a companion whom he brought with him. 8 *Co.* 33.

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lar, yet his permitting him to draw and ſell it at all is impliedly a general command.

IN the ſame manner, whatever a ſervant is permitted to do in the uſual courſe of his buſineſs, is equivalent to a general command. If I pay money to a banker's ſervant, the banker is anſwerable for it: if I pay it to a clergyman's or a phyſician's ſervant, whoſe uſual buſineſs it is not to receive money for his maſter, and he embezzles it, I muſt pay it over again. If a ſteward lets a leaſe of a farm, without the owner's knowlege, the owner muſt ſtand to the bargain; for this is the ſteward's buſineſs. A wife, a friend, a relation, that uſe to tranſact buſineſs for a man, are *quoad hoc* his ſervants; and the principal muſt anſwer for their conduct: for the law implies, that they act under a general command; and without ſuch a doctrine as this no mutual intercourſe between man and man could ſubſiſt with any tolerable convenience. If I uſually deal with a tradeſman by myſelf, or conſtantly pay him ready money, I am not anſwerable for what my ſervant takes up upon truſt; for here is no implied order to the tradeſman to truſt my ſervant: but if I uſually ſend him upon truſt, or ſometimes on truſt and ſometimes with ready money, I am anſwerable for all he takes up; for the tradeſman cannot poſſibly diſtinguiſh when he comes by my order, and when upon his own authority[k] (12).

[431] IF a ſervant, laſtly, by his negligence does any damage to a ſtranger, the maſter ſhall anſwer for his neglect: if a ſmith's ſervant lames a horſe while he is ſhoeing him, an action lies againſt the maſter, and not againſt the ſervant. But in theſe caſes the damage muſt be done, while he is actually employed

[k] Dr. & Stud. d. 2. c. 42. Noy's max. c. 44.

(12) And if I once pay for what my ſervant has bought upon truſt, without expreſſing any diſapprobation of it, it is equivalent to a direction to truſt him in future; and I ſhall be anſwerable for all he takes up upon credit, till an expreſs order is given to the tradeſman not to give him further credit.

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in the maſter's ſervice; otherwiſe the ſervant ſhall anſwer for his own miſbehaviour. Upon this principle, by the common law[l], if a ſervant kept his maſter's fire negligently, ſo that his neighbour's houſe was burned down thereby, an action lay againſt the maſter; becauſe this negligence happened in his ſervice: otherwiſe, if the ſervant, going along the ſtreet with a torch, by negligence ſets fire to a houſe; for there he is not in his maſter's immediate ſervice; and muſt himſelf anſwer the damage perſonally. But now the common law is, in the former caſe, altered by ſtatute 6 Anne, c. 3. which ordains that no action ſhall be maintained againſt any, in whoſe houſe or chamber any fire ſhall accidentally begin; for their own loſs is ſufficient puniſhment for their own or their ſervant's careleſsneſs. But if ſuch fire happens through negligence of any ſervant, (whoſe loſs is commonly very little,) ſuch ſervant ſhall forfeit 100*l.* to be diſtributed among the ſufferers; and, in default of payment, ſhall be committed to ſome workhouſe and there kept to hard labour for eighteen months[m]. A maſter is, laſtly, chargeable if any of his family layeth or caſteth any thing out of his houſe into the ſtreet or common highway, to the damage of any individual, or the common nuiſance of his majeſty's liege people[n]: for the maſter hath the ſuperintendance and charge of all his houſehold. And this alſo agrees with the civil law[o]; which holds that the *pater familias*, in this and ſimilar caſes, "*ob alterius culpam tenetur, ſive ſervi, ſive liberi.*"

WE may obſerve, that in all the caſes here put, the maſter may be frequently a loſer by the truſt repoſed in his ſervant, but never can be a gainer; he may frequently be anſwerable for his ſervant's miſbehaviour, but never can ſhelter himſelf from puniſhment by laying the blame on his agent. The reaſon of this is ſtill uniform and the ſame; that the wrong done by the ſervant is looked upon in law as the [432]

[l] Noy's max. c. 44.

[m] Upon a ſimilar principle, by the law of the twelve tables at Rome, a perſon by whoſe negligence any fire began, was bound to pay double to the ſufferers; or, if he was not able to pay, was to ſuffer a corporal puniſhment.

[n] Noy's max. c. 44.

[o] *Ff.* 9. 3. 1. *Inſt.* 4. 5. 1.

wrong

wrong of the maſter himſelf; and it is a ſtanding maxim, that no man ſhall be allowed to make any advantage of his own wrong (13).

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(13) The law which obliges maſters to anſwer for the negligence and miſconduct of their ſervants, though oftentimes ſevere upon an innocent perſon, is founded upon principles of public policy, in order to induce maſters to be careful in the choice of their ſervants, upon whom both their own ſecurity and that of others ſo greatly depends. And to prevent maſters from being impoſed upon in the characters of their ſervants, it is enacted by 32 Geo. III. c. 56. that if any perſon ſhall give a falſe character of a ſervant, or a falſe account of his former ſervice; or if any ſervant ſhall give ſuch falſe account, or ſhall bring a falſe character, or ſhall alter a certificate of a character, he ſhall, upon conviction before a juſtice of the peace, forfeit 20*l.* with 10*s.* coſts. The informer is a competent witneſs. But if any ſervant will inform againſt an accomplice, he ſhall be acquitted.

An action was tried at the ſittings after Trinity term 1792, at Guildhall, againſt a perſon who had knowingly given a falſe character of a man to the plaintiff, who was thereby induced to take him into his ſervice. But this ſervant ſoon afterwards robbed his maſter of property to a great amount, for which he was executed. And the plaintiff recovered damages againſt the defendant to the extent of his loſs. This was an action of great importance to the public, and there can be no doubt but it was founded in ſtrict principles of law and juſtice.

CHAPTER THE FIFTEENTH.

OF HUSBAND AND WIFE.

THE ſecond private relation of perſons is that of marriage, which includes the reciprocal rights and duties of huſband and wife; or, as moſt of our elder law books call them, of *baron* and *feme*. In the conſideration of which I ſhall in the firſt place inquire, how marriages may be contracted or made; ſhall next point out the manner in which they may be diſſolved; and ſhall, laſtly, take a view of the legal effects and conſequence of marriage.

I. OUR law conſiders marriage in no other light than as a civil contract. The *holineſs* of the matrimonial ſtate is left entirely to the eccleſiaſtical law: the temporal courts not having juriſdiction to conſider unlawful marriage as a ſin, but merely as a civil inconvenience. The puniſhment therefore, or annulling, of inceſtuous or other unſcriptural marriages, is the province of the ſpiritual courts; which act *pro ſalute animae*[a]. And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all caſes, where the parties at the time of making it were, in the firſt place, *willing* to contract; ſecondly, *able* to contract; and, laſtly, actually *did* contract, in the proper forms and ſolemnities required by law.

[a] Salk. 121.

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FIRST, they must be *willing* to contract. "*Consensus non* "*concubitus, facit nuptias,*" is the maxim of the civil law in this case[b]: and it is adopted by the common lawyers[c], who indeed have borrowed (especially in antient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

SECONDLY, they must be *able* to contract. In general, all persons are able to contract themselves in marriage, unless they labour under some particular disabilities, and incapacities. What those are, it will be here our business to inquire.

Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are precontract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labour under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties[d]. And therefore when a man had married his first wife's sister, and after her death the bishop's court was pro-

[b] *Ff.* 50. 17. 30. [c] Co. Litt. 33. [d] *Ibid.*

ceeding to annul the marriage and baſtardize the iſſue, the court of king's bench granted a prohibition *quoad hoc*; but permitted them to proceed to puniſh the huſband for inceſt[e]. Theſe canonical diſabilities being entirely the province of the eccleſiaſtical courts, our books are perfectly ſilent concerning them. But there are a few ſtatutes, which ſerve as directories to thoſe courts, of which it will be proper to take notice. By ſtatute 32 Hen. VIII. c. 38. it is declared, that all perſons may lawfully marry, but ſuch as are prohibited by God's law (1); and that all marriages contracted by lawful perſons in the face of the church, and conſummate with bodily knowlege, and fruit of children, ſhall be indiſſoluble. And (becauſe in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the ſame ſtatute, that nothing (God's law except) ſhall impeach any marriage, but within the Levitical degrees (2); the fartheſt of which is that between uncle and niece[f]. By

[e] Salk. 548. [f] Gilb. Rep. 158.

(1) In this ſtatute the prohibitions by God's law are not ſpecified; but in the 25 Hen. VIII. c. 22. and 28 Hen. VIII. c. 7. the prohibited degrees are particularized. It is doubtful whether theſe two laſt ſtatutes are in force. 2 *Burn. Ec.* 405. But ſo far they ſeem only to be declaratory of the Levitical law. The former declared null and void the marriage between Hen. VIII. and Catharine of Arragon, the widow of his eldeſt brother prince Arthur; for which a diſpenſation had been obtained from the pope.

The queſtion reſpecting the validity of this diſpenſation produced that quarrel between the king and the pope, which ended in the abolition of the dominion of the latter in this country: and the inconſtancy of that capricious king's affections accelerated the reformation of our religion.

(2) The prohibited degrees are all which are under the 4th degree of the civil law, except in the aſcending and deſcending line, and by the courſe of nature it is ſcarcely a poſſible caſe that any one ſhould ever marry his iſſue in the 4th degree; but between collaterals

the ſame ſtatute all impediments ariſing from pre-contracts to other perſons, were aboliſhed and declared of none effect, unleſs they had been conſummated with bodily knowlege: in which caſe the canon law holds ſuch contract to be a marriage *de facto*. But this branch of the ſtatute was repealed by ſtatute 2 & 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33. (which prohibits all ſuits in eccleſiaſtical courts to compel a marriage, in conſequence of any contract) may collaterally extend to revive this clauſe of Henry VIII's ſtatute, and aboliſh the impediment of pre-contract, I leave to be conſidered by the canoniſts (3).

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laterals it is univerſally true, that all who are in the 4th or any higher degree are permitted to marry; as firſt-couſins are in the 4th degree, and therefore may marry, and nephew and great aunt, or niece and great uncle, are alſo in the 4th degree, and may intermarry: and though a man may not marry his grand-mother, it is certainly true that he may marry her ſiſter. *Gibſ. Cod.* 413. See the computation of degrees by the civil law, 2 vol. p. 207. The ſame degrees by affinity are prohibited. Affinity always ariſes by the marriage of one of the parties ſo related; as a huſband is related by affinity to all the *conſaguinei* of his wife; and *vice verſâ* the wife to the huſband's *conſanguinei*: for the huſband and wife being conſidered one fleſh, thoſe who are related to the one by blood, are related to the other by affinity. *Gibſ. Cod.* 412. Therefore a man after his wife's death cannot marry her ſiſter, aunt, or niece. But the *conſanguinei* of the huſband are not at all elated to the *conſanguinei* of the wife. Hence two brothers may marry two ſiſters, or father and ſon a mother and daughter: or if a brother and ſiſter marry two perſons not related, and the brother and ſiſter die, the widow and widower may intermarry; for though I am related to my wife's brother by affinity, I am not ſo to my wife's brother's wife, whom, if circumſtances would admit, it would not be unlawful for me to marry.

(3) A contract *per verba de præſenti tempore* uſed to be conſidered in the eccleſiaſtical courts *ipſum matrimonium*, and if either party had afterwards married, this, as a ſecond marriage, would have been annulled in the ſpiritual courts, and the firſt contract enforced. See an inſtance of it 4 *Co.* 29. But as this pre-engagement

THE other ſort of diſabilities are thoſe which are created, or at leaſt enforced, by the municipal laws. And though ſome of them may be grounded on natural law, yet they are regarded by the laws of the land, not ſo much in the light of any moral offence, as on account of the civil inconveniences they draw after them. Theſe civil diſabilities make the contract void *ab initio*, and not merely voidable; not that they diſſolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put aſunder thoſe who are joined together, but they previouſly hinder the junction. And, if any perſons under theſe legal incapacities come together, it is a meretricious, and not a matrimonial, union. [436]

1. THE firſt of theſe legal diſabilities is a prior marriage, or having another huſband or wife living; in which caſe, beſides the penalties conſequent upon it as a felony(4), the ſecond marriage is to all intents and purpoſes void[g]: polygamy being condemned both by the law of the new teſtament, and the policy of all prudent ſtates, eſpecially in theſe northern climates. And Juſtinian, even in the climate of modern Turkey, is expreſs[h], that "*duas uxores eodem tempore habere* "*non licet.*"

2. THE next legal diſability is want of age. This is ſufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori* therefore it ought to avoid this, the moſt important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of con-

[g] Bro. *Abr. tit. Baſtardy*, pl. 8. [h] *Inſt.* 1. 10. 6.

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ment can no longer be carried into effect as a marriage, I think we may now be aſſured that it will never more be an impediment to a ſubſequent marriage actually ſolemnized and conſummated.

(4) See the exceptions, 4 vol. 164.

ſent aforeſaid, they may diſagree and declare the marriage void, without any divorce or ſentence in the ſpiritual court. This is founded on the civil law[i]. But the canon law pays a greater regard to the conſtitution, than the age, of the parties[k]; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is ſo far a marriage, that, if at the age of conſent they agree to continue together, they need not be married again[l]. If the huſband be of years of diſcretion, and the wife under twelve, when ſhe comes to years of diſcretion he may diſagree as well as ſhe may: for in contracts the obligation muſt be mutual; both muſt be bound, or neither(5): and ſo it is, *vice verſa*, when the wife is of years of diſcretion, and the huſband under[m].

[437] 3. ANOTHER incapacity ariſes from want of conſent of parents or guardians. By the common law, if the parties themſelves were of the age of conſent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law. But, by ſeveral ſtatutes[n], penalties

[i] *Leon. Conſtit.* 109.
[k] *Decretal. l.* 4. *tit.* 2. *qu.* 3.
[l] Co. Litt. 79.
[m] *Ibid.*
[n] 6 & 7 Will. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19.

(5) This propoſition is too generally expreſſed; for there are various contracts between a perſon of full age and a minor, in which the former is bound and the latter is not. The authorities ſeem deciſive that it is true with regard to the contract of marriage referred to the ages of 14 and 12; but it has alſo long been clearly ſettled that it is not true with regard to contracts for marriage referred to the minority under twenty-one.

For where there are mutual promiſes to marry between two perſons, one of the age of 21 and the other under that age, the firſt is bound by the contract, and on the ſide of the minor it is voidable; or for a breach of the promiſe on the part of the perſon of full age, the minor may maintain an action and recover damages, but no action can be maintained for a ſimilar breach of the contract on the ſide of the minor. Holt *v.* Ward Clarencieux, *Str.* 937. *S. C. Fitzg.* 175. 275.

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of 100 *l.* are laid on every clergyman who marries a couple either without publication of banns (which may give notice to parents or guardians) or without a licence, to obtain which the conſent of parents or guardians muſt be ſworn to (6). And by the ſtatute 4 & 5 Ph. and M. c. 8. whoſoever marries any woman child under the age of ſixteen years, without conſent of parents or guardians, ſhall be ſubject to fine, or five years impriſonment: and her eſtate during the huſband's(7) life ſhall go to and be enjoyed by the next heir. The civil law indeed required the conſent of the parent or tutor at all ages; unleſs the children were emancipated, or out of the parents power[o]: and if ſuch conſent from the father was wanting, the marriage was null, and the children illegitimate[p]; but the conſent of the mother or guardians, if unreaſonably withheld, might be redreſſed and ſupplied by the judge, or the preſident of the province[q]: and if the father was *non compos*, a ſimilar remedy was given[r]. Theſe proviſions are adopted and imitated by the French and Hollanders, with this difference: that in France the ſons cannot marry without conſent of parents till thirty years of age, nor the daughters till twenty-five[s]; and in Holland, the ſons are at their own diſpoſal at twenty-five, and the daughters at twenty[t]. Thus hath ſtood, and thus at preſent ſtands, the law in other neighbouring countries. And it has lately been thought proper

[o] *Ff.* 23. 2. 2, & 18.
[p] *Ff.* 1. 5. 18.
[q] *Cod.* 5. 4. 1, & 20.
[r] *Inſt.* 1. 10. 1.
[s] Domat. of dowries, § 2. Monteſq. Sp. L. 23. 7.
[t] *Vinnius in Inſt. l.* 1. *t.* 10.

(6) By the 26 Geo. II. c. 33. ſ. 7. if any clergyman ſhall marry a couple out of a church or a public chapel, where banns had been uſually publiſhed before 1754, unleſs by ſpecial licence from the archbiſhop; or ſhall marry them without a licence, or publication of banns; he ſhall be guilty of felony, and ſhall be tranſported for 14 years. And there have been inſtances of convictions for this offence.

(7) The conſtruction of the ſtatute ſeems to be, that it ſhall alſo go to the next heir during the life of the wife, even after the death of the huſband. 1 *Brown. Ch. Rep.* 23. But the contrary has been decided in the exchequer. *Amb.* 73.

to introduce ſomewhat of the ſame policy into our laws, by ſtatute 26 Geo. II. c. 33. whereby it is enacted, that all marriages celebrated by licence (for banns ſuppoſe notice) where either of the parties is under twenty-one, (not being
[438] a widow or widower, who are ſuppoſed emancipated,) without the conſent of the father, or, if he be not living, of the mother or guardians (8), ſhall be abſolutely void. A like proviſion is made as in the civil law, where the mother or guardian is *non compos*, beyond ſea, or unreaſonably froward, to diſpenſe with ſuch conſent at the diſcretion of the lord chancellor: but no proviſion is made, in caſe the father ſhould labour under any mental or other incapacity (9). Much may be, and much has been ſaid, both for and againſt this innovation upon our antient laws and conſtitution. On the one hand, it prevents the clandeſtine marriages of minors, which are often a terrible inconvenience to thoſe private families wherein they happen. On the other hand, reſtraints upon marriages, eſpecially among the lower claſs, are evidently detrimental to the public, by hindering the increaſe of the people; and to religion and morality, by encouraging licentiouſneſs

(8) A matter of ſuch importance deſerves to be more particularly ſtated: the party under age marrying by licence, if a minor, and not having been married before, muſt have the conſent of a father, if living; if he be dead, of a guardian *lawfully appointed*; if there be no ſuch guardian, then of the mother if ſhe is unmarried; if there be no mother, then of a guardian appointed by the court of chancery. The guardian whoſe conſent is interpoſed between that of the father and that of the mother, muſt either be a teſtamentary guardian appointed by the father's will, or a guardian appointed by chancery; or if there is no ſuch guardian, and the minor is under the age of fourteen, and has lands by deſcent, perhaps the conſent of a ſocage guardian would be ſufficient; though it might not be prudent to rely upon it alone, and ſuch an early marriage now ſeldom happens.

(9) The words of the ſtatute are, "if any ſuch guardian, or mother, or *any of them*, whoſe conſent is made neceſſary, ſhall be *non compos mentis*," &c. Under the words *any of them*, I conceive that the chancellor would think himſelf enabled to conſent for a father, whoſe conſent it was thus impoſſible to obtain.

and debauchery among the ſingle of both ſexes; and thereby deſtroying one end of ſociety and government, which is *concubitu prohibere vago*. And of this laſt inconvenience the Roman laws were ſo ſenſible, that at the ſame time that they forbad marriage without the conſent of parents or guardians, they were leſs rigorous upon that very account with regard to other reſtraints: for, if a parent did not provide a huſband for his daughter, by the time ſhe arrived at the age of twenty-five, and ſhe afterwards made a ſlip in her conduct, he was not allowed to diſinherit her upon that account; "*quia non* "*ſua culpa, ſed parentum, id commiſiſſe cognoſcitur*[t]."

4. A FOURTH incapacity is want of reaſon; without a competent ſhare of which, as no other, ſo neither can the matrimonial contract be valid[w]. It was formerly adjudged, that the iſſue of an idiot was legitimate, and conſequently that his marriage was valid. A ſtrange determination! ſince conſent is abſolutely requiſite to matrimony, and neither idiots nor lunatics are capable of conſenting to any thing. And therefore the civil law judged much more ſenſibly when it made ſuch deprivations of reaſon a previous impediment; though not a cauſe of divorce, if they happened after mar- [439]
riage[x]. And modern reſolutions have adhered to the reaſon of the civil law, by determining[y] that the marriage of a lunatic, not being in a lucid interval, was abſolutely void. But as it might be difficult to prove the exact ſtate of the party's mind at the actual celebration of the nuptials, upon this account (concurring with ſome private family[z] reaſons) the ſtatute 15 Geo. II. c. 30. has provided that the marriage of lunatics and perſons under phrenzies (if found lunatics under a commiſſion, or committed to the care of truſtees by any act of parliament) before they are declared of ſound mind by the lord chancellor or the majority of ſuch truſtees, ſhall be totally void(10).

[t] *Nov.* 115. § 11.
[w] 1 Roll. Abr. 357.
[x] *Ff.* 23. *tit.* 1. *l.* 8. *& tit.* 2. *l.* 16.
[y] Morriſon's caſe, *coram Delegat.*
[z] See private acts 23 Geo. II. c. 6.

(10) Till the 2 & 3 Edw. VI. c. 21. the clergy in this country were prohibited to marry, by various laws and canons; a ſtatute in

LASTLY, the parties muſt not only be willing and able to contract, but actually muſt contract themſelves in due form of law, to make it a good civil marriage. Any contract made, *per verba de preſenti*, or in words of the preſent tenſe, and in caſe of cohabitation *per verba de futuro* alſo, between perſons able to contract, was before the late act deemed a valid

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the 31 Hen. VIII. c. 14. having even made it felony. But the legiſlature by 2 & 3 Edw. VI. c. 21. repealed the laws and canons which impoſed that ſevere reſtriction upon the clergy, and granted them the ſame indulgence that the laity enjoyed. The preamble to that ſtatute, as almoſt all the preambles to the ſtatutes in that ſhort reign, is expreſſed with a remarkable degree of eloquence. "Although it were not only better for the eſtimation of prieſts "and other miniſters in the church of God, to live chaſte, ſole, and "ſeparate from the company of women, and the bond of marriage; "but alſo thereby they might the better intend to the adminiſ-"tration of the goſpel, and be leſs intricated and troubled with "the charge of houſehold, being free and unburthened from the "care and coſt of finding wife and children; and that it were moſt "to be wiſhed, that they would willingly and of their ſelves en-"deavour themſelves to a perpetual chaſtity and abſtinence from "the uſe of women: yet, foraſmuch as the contrary hath rather "been ſeen, and ſuch uncleanlineſs of living, and other great incon-"veniencies not meet to be rehearſed, have followed of compelled "chaſtity, and of ſuch laws as have prohibited thoſe the godly "uſe of marriage; it were better, and rather to be ſuffered in "the commonwealth, that thoſe which could not contain, ſhould, "after the counſel of ſcripture, live in holy marriage, than feign-"edly abuſe with worſe enormity, outward chaſtity or ſingle "life." But this ſtatute, like all the other reforms in the church, was repealed by queen Mary, and it was not revived again till the 1 Ja. I. c. 25. though the thirty-nine articles had been paſſed in convocation in the fifth year of the reign of qneen Elizabeth; the 32d of which declares, that it is lawful for the biſhops, prieſts, and deacons, as for all other chriſtian men, to marry at their own diſcretion.

The clerks in chancery, though laymen, were not allowed to marry till the 14 & 15 Hen. VIII. c. 8. And no lay doctor of civil law, if he was married, could exerciſe any eccleſiaſtical juriſdiction till 37 Hen. VIII. c. 7. 2 *Burn. Ec. L.* 428.

marriage

marriage to many purpoſes; and the parties might be compelled in the ſpiritual courts to celebrate it *in facie eccleſiae*. But theſe verbal contracts are now of no force, to compel a future marriage[a]. Neither is any marriage at preſent valid, that is not celebrated in ſome pariſh church or public chapel (11), unleſs by diſpenſation from the archbiſhop of Canterbury. It muſt alſo be preceded by publication of banns, or by licence from the ſpiritual judge. Many other formalities are likewiſe preſcribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be alſo eſſential to a marriage, that it be performed by a perſon in orders[b]; though the intervention of a prieſt to ſolemnize this contract is merely *juris poſitivi*, and not *juris naturalis aut divini*: it being ſaid that pope Innocent the third was the firſt who ordained the celebration of marriage in the church[c]; before which it was totally a civil contract. And, in the times of [440] the grand rebellion, all marriages were performed by the juſtices of the peace; and theſe marriages were declared valid, without any freſh ſolemnization, by ſtatute 12 Car. II. c. 33. But, as the law now ſtands, we may upon the whole collect, that no marriage by the temporal law is *ipſo facto void*, that is celebrated by a perſon in orders, in a pariſh church or public chapel (or elſewhere, by ſpecial diſpenſation) —in purſuance of banns or a licence,—between ſingle per-

[a] Stat. 26 Geo. II. c. 33. [b] Salk. 119. [c] Moor. 170.

(11) The marriage act requires, that the marriage ſhall be celebrated in ſome pariſh church or public chapel, where banns had been uſually publiſhed; *i. e.* before the 25th of March 1754. In conſequence of this conſtruction, the court of king's bench were obliged to declare a marriage void, which had been ſolemnized in a chapel erected in 1765. (*Doug.* 659.) And as there were many marriages equally defective, an act of parliament was immediately paſſed, which legalized all marriages celebrated in ſuch churches or chapels, ſince the paſſing of the marriage act; and it alſo indemnified the clergymen from the penalties they had incurred. 21 *Geo. III. c.* 53.

ſons,—conſenting,—of ſound mind,—and of the age of twenty-one years;—or of the age of fourteen in males and twelve in females, with conſent of parents or guardians, or without it, in caſe of widowhood. And no marriage is *voidable* by the eccleſiaſtical law, after the death of either of the parties, nor during their lives, unleſs for the canonical impediments of pre-contract, if that indeed ſtill exiſts; of conſanguinity; and of affinity, or corporal imbecility, ſubſiſting previous to their marriage.

II. I AM next to conſider the manner in which marriages may be diſſolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one a *vinculo matrimonii*, the other merely *a menſa et thoro*. The total divorce, *a vinculo matrimonii*, muſt be for ſome of the canonical cauſes of impediment before-mentioned; and thoſe, exiſting *before* the marriage, as is always the caſe in conſanguinity; not ſupervenient, or ariſing *afterwards*, as may be the caſe in affinity or corporal imbecility(12). For in caſes of total divorce, the marriage is declared null, as having been abſolutely unlawful *ab initio;* and the parties are therefore ſeparated *pro ſalute animarum:* for which reaſon, as was before obſerved, no divorce can be obtained, but during the life of the parties. The iſſue of ſuch marriage as is thus entirely diſſolved, are baſtards[d].

DIVORCE *a menſa et thoro* is when the marriage is juſt and lawful *ab initio*, and therefore the law is tender of diſſolving it; but, for ſome ſupervenient cauſe, it becomes improper or

[d] Co. Litt. 235.

(12) Corporal imbecility may ariſe after the marriage, which will not then vacate the marriage, becauſe there was no fraud in the original contract; and one of the ends of marriage, *viz.* the legitimate procreation of children, may have been anſwered: but no kindred by affinity can happen ſubſequently to the marriage; for as affinity always depends upon the previous marriage of one of the parties ſo related; if a huſband and wife are not ſo related at the time of the marriage, they never can become ſo afterwards.

impoſſible

impoſſible for the parties to live together: as in the caſe of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this caſe, deems ſo highly and with ſuch myſterious reverence of the nuptial tie, that it will not allow it to be unlooſed for any cauſe whatſoever, that ariſes after the union is made. And this is ſaid to be built on the divine revealed law; though that expreſsly aſſigns incontinence as a cauſe, and indeed the only cauſe, why a man may put away his wife and marry another [e]. The civil law, which is partly of pagan original, allows many cauſes of abſolute divorce; and ſome of them pretty ſevere ones: (as if a wife goes to the theatre or the public games, without the knowlege and conſent of the huſband [f],) but among them adultery is the principal, and with reaſon named the firſt [g]. But with us in England adultery is only a cauſe of ſeparation from bed and board [h]: for which the beſt reaſon that can be given, is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the caſe when divorces were allowed for canonical diſabilities, on the mere confeſſion of the parties [i], which is now prohibited by the canons [k] (13). However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament (14).

[e] Matt. xix. 9.
[f] *Nov.* 117.
[g] *Cod.* 5. 17. 8.
[h] Moor. 683.
[i] 2 Mod. 314.
[k] Can. 1603. c. 105.

(13) A huſband cannot obtain a divorce in the eccleſiaſtical courts for the adultery of his wife if ſhe recriminates, and can prove that he alſo has been unfaithful to the marriage vow; this ſeems to be founded on the following rational precept of the civil law, *judex adulterii ante oculos habere debet et inquirere, an maritus pudicè vivens, mulieri quoque bonos mores colendi autor fuerit. Periniquum enim videtur eſſe, ut pudicitiam vir ab uxore exigat, quam ipſe non exhibeat.* Ff. 48. 5. 13.

(14) To prevent divorces *a vinculo matrimonii* from being obtained in parliament by fraud and colluſion, the two houſes not only

IN caſe of divorce *a menſa et thoro*, the law allows alimony to the wife: which is that allowance, which is made to a woman for her ſupport out of the huſband's eſtate: being ſettled at the diſcretion of the eccleſiaſtical judge, on conſideration of all the circumſtances of the caſe. This is ſometimes called her *eſtovers*; for which, if he refuſes payment, there is (beſides the ordinary proceſs of excommunication) a writ at common law *de eſtoveriis habendis*, in order to recover it[l]. It is generally proportioned to the rank and quality of
[442] the parties. But in caſe of elopement, and living with an adulterer, the law allows her no alimony[m].

III. HAVING thus ſhewn how marriages may be made, or diſſolved, I come now, laſtly, to ſpeak of the legal conſequences of ſuch making, or diſſolution.

BY marriage, the huſband and wife are one perſon in law[n]: that is, the very being or legal exiſtence of the woman is ſuſpended during the marriage, or at leaſt is incorporated and conſolidated into that of the huſband: under whoſe wing, protection, and *cover*, ſhe performs every thing; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*; is ſaid to be *covert-baron*, or under the protection and influence of her huſband, her *baron*, or lord; and her condition during her marriage is called her *coverture* (15).

[l] 1 Lev. 6. [m] Cowel. tit. Alimony. [n] Co. Litt. 112.

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only examine witneſſes to be convinced of the adultery of the wife, but they require alſo that the huſband ſhall have obtained a ſentence of divorce in the ſpiritual courts, and a verdict with damages in a court of law from ſome one who has had criminal intercourſe with the wife.

(15) Whatever may be the origin of *feme-covert*, it is not perhaps unworthy of obſervation, that it nearly correſponds in it's ſignifications to the Latin word *nupta*; for that is derived *a nubendo*, i. e. *tegendo*, becauſe the modeſty of the bride, it is ſaid, was ſo much conſulted by the Romans upon that delicate occaſion, that ſhe was led to her huſband's home *covered* with a veil.

Upon

Upon this principle, of an union of perſon in huſband and wife, depend almoſt all the legal rights, duties, and diſabilities, that either of them acquire by the marriage. I ſpeak not at preſent of the rights of property, but of ſuch as are merely *perſonal*. For this reaſon, a man cannot grant any thing to his wife, or enter into covenant with her[o]. for the grant would be to ſuppoſe her ſeparate exiſtence: and to covenant with her, would be only to covenant with himſelf(16): and therefore it is alſo generally true, that all compacts made between huſband and wife, when ſingle, are voided by the intermarriage [p]. A woman indeed may be attorney for her huſband [q]; for that implies no ſeparation from, but is rather a repreſentation of, her lord. And a huſband may alſo bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death [r]. The huſband is bound to provide his wife with neceſſaries by law, as much as himſelf: and if ſhe contracts debts for them, he is obliged to pay them [s]; but, for any thing beſides neceſſaries, he is not chargeable[t](17). Alſo if a wife elopes, and lives with another man, the huſband is [443] not chargeable even for neceſſaries [u]; at leaſt if the perſon, who furniſhes them, is ſufficiently apprized of her elopement[w]. If the wife be indebted before marriage, the huſband is bound afterwards to pay the debt; for he has adopted her and her circumſtances together [x](18). If the wife be injured in her

[o] Co. Litt. 112.
[p] Cro. Car. 551.
[q] F. N. B. 27.
[r] Co. Litt. 112.
[s] Salk. 118.
[t] 1 Sid. 120.
[u] Stra. 647.
[w] 1 Lev. 5.
[x] 3 Mod. 136.

(16) But the huſband may grant to the wife by the intervention of truſtees; *Harg. Co. Litt.* 30; and he may ſurrender a copyhold to her uſe. 4 *Co.* 29.

(17) What are neceſſaries muſt be aſcertained by a jury from the rank and circumſtances of the huſband.

(18) But though the huſband has had a great fortune with his wife, if ſhe dies before him, he is not liable to pay her debts contracted before marriage, either in law or equity, unleſs there is ſome part of her perſonal property which he did not reduce into his

perſon or her property, ſhe can bring no action for redreſs without her huſband's concurrence, and in his name, as well as her own [y]: neither can ſhe be ſued, without making the huſband a defendant [z]. There is indeed one caſe where the wife ſhall ſue and be ſued as a feme ſole, *viz.* where the huſband has abjured the realm, or is baniſhed [a], for then he is dead in law (19); and, the huſband being thus diſabled to ſue for or defend the wife, it would be moſt unreaſonable if ſhe had no remedy, or could make no defence at all. In criminal proſecutions, it is true, the wife may be indicted and puniſhed ſeparately [b]; for the union is only a civil union. But, in trials of any ſort, they are not allowed to be evidence for, or againſt, each other [c]: partly becauſe it is impoſſible their teſtimony ſhould be indifferent; but principally becauſe of the union of perſon: and therefore, if they were admitted to be witneſſes *for* each other, they would contradict one maxim of law, "*nemo in propria cauſa teſtis eſſe debet*;" and if *againſt* each other, they would contradict another maxim, "*nemo tenetur ſeipſum accuſare* (20)." But, where the offence is directly

y Salk. 119. 1 Roll. Abr. 347.
z Bro. *Error*. 173. 1 Leon. 312. 1 Sid. 120. This was alſo the practice in the courts of Athens. (Pott. Antiqu. b. 1. c. 21.)
a Co. Litt. 133.
b 1 Hawk. P. C. 3.
c 2 Hawk. P. C. 431.

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his poſſeſſion before her death, which he muſt afterwards recover as her adminiſtrator; and to the extent of the value of that property, he will be liable to pay his wife's debts, *dum ſola*, which remained undiſcharged during the coverture. 1 *P. Wms.* 468.

(19) This principle has lately been extended; and it has been decided by the court of king's bench, that where a married woman is ſeparated from her huſband, and is allowed a ſeparate maintenance by deed, if ſhe then contracts debts, ſhe may be ſued as a *feme ſole*. Corbet *v.* Baron Poloenwitz and wife, 1 *T. R.* 5. The authority of this deciſion was at the firſt much queſtioned; but it ſeems now to be acquieſced under.

It is alſo held, that if the wife ſpends the whole of her ſettlement and allowance, the huſband will not afterwards be liable even for neceſſaries. *Ib.*

(20) The union of perſon is ſcarce ſufficient to account for this rule of law; for the confeſſions of the huſband or wife are no evidence

againſt the perſon of the wife, this rule has been uſually diſpenſed with[d]: and therefore, by ſtatute 3 Hen. VII. c. 2. in caſe a woman be forcibly taken away, and married, ſhe may be a witneſs againſt ſuch her huſband, in order to convict him of felony. For in this caſe ſhe can with no propriety be reckoned his wife; becauſe a main ingredient, her conſent, was wanting to the contract: and alſo there is another maxim of law, that no man ſhall take advantage of his own wrong: which the raviſher here would do, if by forcibly marrying a woman, he could prevent her from being a wit- [444]
neſs, who is perhaps the only witneſs, to that very fact.

IN the civil law the huſband and the wife are conſidered as two diſtinct perſons; and may have ſeparate eſtates, contracts, debts, and injuries[e]: and therefore, in our eccleſiaſtical courts, a woman may ſue and be ſued without her huſband[f] (21).

[d] State trials, vol. 1. Lord Audley's caſe. Stra. 633.

[e] *Cid.* 4. 12. 1.

[f] 2 Roll. Abr. 298.

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dence againſt the other, yet the confeſſions of the party are legal evidence: but the better reaſon ſeems to be, that which is generally aſſigned, *viz.* if a wife were a witneſs for her huſband, ſhe would be under a ſtrong temptation to commit perjury; and if againſt her huſband, it would be contrary to the policy of marriage, and might create much domeſtic diſſenſion and unhappineſs: ſo *vice verſa* of the huſband. *Bull. N. P.* 286. But this rule, I ſhould think, ought to be confined to caſes where the huſband or wife is a party in the action or proſecution; yet in one caſe it ſeems to have been held, that a wife ſhall not be called in any caſe to give evidence, even tending to criminate her huſband. 2 *T. R.* 263. If this be true, a plaintiff or proſecutor may have the benefit of the teſtimony of the one, and the defendant or priſoner cannot have the benefit of the teſtimony of the other; becauſe the evidence of the latter would tend to charge the former with perjury. Surely in ſuch caſes, where the intereſts of ſtrangers are concerned, the furtherance of public juſtice is a conſideration far ſuperior to the policy of marriage, or the domeſtic ſtrifes of the witneſſes.

(21) A feme covert having a ſeparate eſtate, may, in a court of equity, be ſued as a feme ſole, and be proceeded againſt without her huſband; for, in reſpect of her ſeparate eſtate, ſhe is looked

BUT, though our law in general conſiders man and wife as one perſon, yet there are ſome inſtances in which ſhe is ſeparately conſidered; as inferior to him, and acting by his compulſion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which caſe ſhe muſt be ſolely and ſecretly examined, to learn if her act be voluntary[g]. She cannot by will deviſe lands to her huſband, unleſs under ſpecial circumſtances; for at the time of making it ſhe is ſuppoſed to be under his coercion[h]. And in ſome felonies, and other inferior crimes, committed by her, through conſtraint of her huſband, the law excuſes her[i] (22): but this extends not to treaſon or murder.

THE huſband alſo (by the old law) might give his wife moderate correction[k]. For, as he is to anſwer for her miſbehaviour, the law thought it reaſonable to intruſt him with this power of reſtraining her, by domeſtic chaſtiſement, in the ſame moderation that a man is allowed to correct his apprentices or children; for whom the maſter or parent is alſo liable in ſome caſes to anſwer. But this power of correction was confined within reaſonable bounds[l], and the huſband was prohibited from uſing any violence to his wife, *aliter quam ad virum, ex cauſa regiminis et caſtigationis uxoris ſuae, licite et rationabiliter pertinet*[m]. The civil law gave the huſband the
[445] ſame, or a larger, authority over his wife: allowing him, for ſome miſdemeſnors, *flagellis et fuſtibus acriter verberare uxorem*; for others, only *modicam caſtigationem adhibere*[n]. But, with

g Litt. § 669, 670.
h Co. Litt. 112.
i 1 Hawk. P. C. 2.
k *Ibid.* 130.
l Moor. 874.
m F. N. B. 80.
n *Nov.* 117. *c.* 14. & Van Leeuwen *in loc.*

looked upon as a feme ſole. 2 *Ver.* 614. And in a court of equity, baron and feme are conſidered as two diſtinct perſons, and therefore a wife by her prochein amy, may ſue her own huſband. 3 *Cox. P. Wms.* 39.

(22) This conſtraint and coercion of the huſband is preſumed, when the wife is in company with the huſband.

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us in the politer reign of Charles the ſecond, this power of correction began to be doubted [o]: and a wife may now have ſecurity of the peace againſt her huſband [p]; or, in return, a huſband againſt his wife [q]. Yet the lower rank of people, who were always fond of the old common law, ſtill claim and exert their antient privilege: and the courts of law will ſtill permit a huſband to reſtrain a wife of her liberty, in caſe of any groſs miſbehaviour [r].

THESE are the chief legal effects of marriage during the coverture; upon which we may obſerve, that even the diſabilities, which the wife lies under, are for the moſt part intended for her protection and benefit. So great a favourite is the female ſex of the laws of England (23).

[o] 1 Sid. 113. 3 Keb. 433.
[p] 2 Lev. 128.
[q] Stra. 1207.
[r] Stra. 478. 875.

(23) Nothing, I apprehend, would more conciliate the goodwill of the ſtudent in favour of the laws of England, than the perſuaſion that they had ſhewn a partiality to the female ſex. But I am not ſo much in love with my ſubject as to be inclined to leave it in poſſeſſion of a glory which it may not juſtly deſerve. In addition to what has been obſerved in this chapter, by the learned Commentator, I ſhall here ſtate ſome of the principal differences in the Engliſh law, reſpecting the two ſexes; and I ſhall leave it to the reader to determine on which ſide is the balance, and how far this compliment is ſupported by truth.

Huſband and wife, in the language of the law, are ſtiled *baron* and *feme*: the word baron, or lord, attributes to the huſband not a very courteous ſuperiority. But we might be inclined to think this merely an unmeaning technical phraſe, if we did not recollect, that if the baron kills his feme, it is the ſame as if he had killed a ſtranger, or any other perſon; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as ſhe not only breaks through the reſtraints of humanity and conjugal affection, but throws off all ſubjection to the authority of her huſband. And therefore the law denominates her crime, a ſpecies of treaſon, and condemns her to the ſame puniſhment as if ſhe had killed the king. And for every ſpecies of treaſon, (though in petit treaſon

the puniſhment of men was only to be drawn and hanged,) till the 30 Geo. III. c. 48. the ſentence of women was to be drawn and burnt alive. 4 Vol. 204.

By the common law all women were denied the benefit of clergy; and till the 3 and 4 W. & M. c. 9. they received ſentence of death, and might have been executed, for the firſt offence in ſimple larceny, bigamy, manſlaughter, &c. however learned they were, merely becauſe their ſex precluded the poſſibility of their taking holy orders; though a man, who could read, was for the ſame crime ſubject only to burning in the hand and a few months impriſonment. 4 Vol. 369.

Theſe are the principal diſtinctions in criminul matters; now let us ſee how the account ſtands with regard to civil rights.

Inteſtate perſonal property is equally divided between males and females; but a ſon, though younger than all his ſiſters, is heir to the whole of real property.

A woman's perſonal property, by marriage, becomes abſolutely her huſband's, which at his death he may leave entirely away from her; but if he dies without will, ſhe is entitled to one-third of his perſonal property, if he has children; if not, to one-half. In the province of York, to four-ninths or three-fourths.

By the marriage, the huſband is abſolutely maſter of the profits of the wife's lands during the coverture; and if he has had a living child, and ſurvives the wife, he retains the whole of thoſe lands, if they are eſtates of inheritance, during his life: but the wife is entitled only to dower, or one-third, if ſhe ſurvives, out of the huſband's eſtates of inheritance; but this ſhe has, whether ſhe has had a child or not.

But a huſband can be tenant by the curteſy of the truſt eſtates of the wife, though the wife cannot be endowed of the truſt eſtates of the huſband. 3 *P. Wms.* 229.

With regard to the property of women, there is taxation without repreſentation; for they pay taxes without having the liberty of voting for repreſentatives; and indeed there ſeems at preſent no ſubſtantial reaſon why ſingle women ſhould be denied this privilege. Though the chaſtity of women is protected from violence, yet a parent can have no reparation, by our law, from the ſeducer of his daughter's virtue, but by ſtating that ſhe is his ſervant, and that by the conſequences of the ſeduction, he is deprived of the benefit of her labour: or where the ſeducer, at the ſame time, is a treſpaſſer upon the cloſe or premiſes of the parent. But when by ſuch forced circumſtances

circumſtances the law can take cognizance of the offence, juries diſregard the pretended injury, and give damages commenſurate to the wounded feelings of a parent.

Female virtue, by the temporal law, is perfectly expoſed to the ſlanders of malignity and falſehood; for any one may proclaim in converſation, that the pureſt maid, or the chaſteſt matron, is the moſt meretricious and incontinent of women, with impunity, or free from the animadverſions of the temporal courts. Thus female honour, which is dearer to the ſex than their lives, is left by the common law to be the ſport of an abandoned calumniator. 3 Vol. 125.

From this impartial ſtatement of the account, I fear there is little reaſon to pay a compliment to our laws for their reſpect and favour to the female ſex.

CHAPTER THE SIXTEENTH.

OF PARENT AND CHILD.

THE next, and the moſt univerſal relation in nature, is immediately derived from the preceding, being that between parent and child.

CHILDREN are of two ſorts; legitimate, and ſpurious, or baſtards; each of which we ſhall conſider in their order; and, firſt, of legitimate children.

I. A LEGITIMATE child is he that is born in lawful wedlock, or within a competent time afterwards. "*Pater eſt* "*quem nuptiae demonſtrant*," is the rule of the civil law[a]; and this holds with the civilians, whether the nuptials happen before, or after, the birth of the child. With us in England the rule is narrowed, for the nuptials muſt be precedent to the birth; of which more will be ſaid when we come to conſider the caſe of baſtardy. At preſent let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of ſuch children to their parents.

1. AND, firſt, the duties of parents, to legitimate children: which principally conſiſt in three particulars; their maintenance, their protection, and their education.

[447] THE duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, ſays

[a] *Ff.* 2. 4. 5.

Puffendorf,

Puffendorf[b], laid on them not only by nature herſelf, but by their own proper act, in bringing them into the world: for they would be in the higheſt manner injurious to their iſſue, if they only gave their children life, that they might afterwards ſee them periſh. By begetting them therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have beſtowed ſhall be ſupported and preſerved. And thus the children will have a perfect *right* of receiving maintenance from their parents. And the preſident Monteſquieu[c] has a very juſt obſervation upon this head: that the eſtabliſhment of marriage in all civilized ſtates is built on this natural obligation of the father to provide for his children: for that aſcertains and makes known the perſon who is bound to fulfil this obligation: whereas, in promiſcuous and illicit conjunctions, the father is unknown; and the mother finds a thouſand obſtacles in her way;—ſhame, remorſe, the conſtraint of her ſex, and the rigor of laws;—that ſtifle her inclinations to perform this duty: and beſides, ſhe generally wants ability.

THE municipal laws of all well-regulated ſtates have taken care to enforce this duty: though providence has done it more effectually than any laws, by implanting in the breaſt of every parent that natural *ſtorgè*, or inſuperable degree of affection, which not even the deformity of perſon or mind, not even the wickedneſs, ingratitude, and rebellion of children, can totally ſuppreſs or extinguiſh.

THE civil law[d] obliges the parent to provide maintenance for his child; and, if he refuſes, "*judex de ea re cognoſcet.*" Nay, it carries this matter ſo far, that it will not ſuffer a parent at his death totally to diſinherit his child, without expreſsly giving his reaſon for ſo doing; and there are fourteen ſuch [448] reaſons reckoned up[e], which may juſtify ſuch diſinheriſon. If the parent alleged no reaſon, or a bad, or a falſe one, the child might ſet the will aſide, *tanquam teſtamentum inofficioſum*, a

[b] L. of N. l. 4. c. 11.
[c] Sp. L. b. 23. c. 2.
[d] *Ff.* 25. 3. 5.
[e] *Nov.* 115.

teſtament contrary to the natural duty of the parent. And it is remarkable under what colour the children were to move for relief in ſuch a caſe: by ſuggeſting that the parent had loſt the uſe of his reaſon, when he made the *inofficious* teſtament. And this, as Puffendorf obſerves[f], was not to bring into diſpute the teſtator's power of diſinheriting his own offſpring; but to examine the motives upon which he did it: and, if they were found defective in reaſon, then to ſet them aſide. But perhaps this is going rather too far; every man has, or ought to have, by the laws of ſociety, a power over his own property: and, as Grotius very well diſtinguiſhes[g], natural right obliges to give a *neceſſary* maintenance to children; but what is more than that they have no other right to, than as it is given them by the favour of their parents, or the poſitive conſtitutions of the municipal law.

LET us next ſee what proviſion our own laws have made for this natural duty. It is a principle of law[h], that there is an obligation on every man to provide for thoſe deſcended from his loins; and the manner, in which this obligation ſhall be performed, is thus pointed out[i]. The father, and mother, grandfather, and grandmother of poor impotent perſons ſhall maintain them at their own charges, if of ſufficient ability, according as the quarter-ſeſſion ſhall direct (1): and [k] if a parent runs away, and leaves his children, the churchwardens and overſeers of the pariſh ſhall ſeiſe his rents, goods, and chattels, and diſpoſe of them toward their relief. By the interpretations which the courts of law have made upon theſe ſtatutes, if a mother or grandmother marries again, and was before ſuch ſecond marriage of ſufficient ability

[f] *l.* 4. *c.* 11. §. 7.
[g] *de j. b. & p. l.* 2. *c.* 7. *n.* 3.
[h] Raym. 500.
[i] Stat. 43 Eliz. c. 2.
[k] Stat. 5 Geo. I. c. 8.

(1) That is, they may reſpectively be compelled to allow each other 20 *s.* a month, or 13 *l.* a year; but that is the greateſt allowance which a ſon can be obliged to make an aged parent, or a father a legitimate child, by our law.

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to keep the child, the husband shall be charged to maintain it[1]: for this being a debt of hers, when single, shall like others extend to charge the husband (2). But at her death, the relation being dissolved, the husband is under no farther obligation.

No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20*s.* a month. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted [m], that if any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish: and therefore in the very next year we find an instance of a jew of immense riches, whose only daughter having embraced christianity, he turned

[1] Styles. 183. 2 Bulstr. 346. [m] Stat. 11 & 12 W. III. c. 4.

(2) It has lately been decided, that the authorities here relied upon by the learned Commentator never were law; and that a husband is not bound, even whilst his wife is alive, to support her parents, or her children, by a former husband, or any other relation; for the statute 43 Eliz. c. 2. extends only to relations by blood. 4 *T. R.* 118. But I conceive if the wife had separate property, an order might be made upon her alone, to support her children and relations.

her out of doors; and on her application for relief, it was held ſhe was entitled to none[n] (3). But this gave occaſion[o] to another ſtatute[p], which ordains, that if jewiſh parents refuſe to allow their proteſtant children a fitting maintenance ſuitable to the fortune of the parent, the lord chancellor on complaint may make ſuch order therein as he ſhall ſee proper.

OUR law has made no proviſion to prevent the diſinheriting of children by will: leaving every man's property in his [450] own diſpoſal, upon a principle of liberty in this, as well as every other, action: though perhaps it had not been amiſs, if the parent had been bound to leave them at the leaſt a neceſſary ſubſiſtence. Indeed, among perſons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the eſtate ſettled upon the eldeſt, by the marriage-articles. Heirs alſo, and children, are favourites of our courts of juſtice, and cannot be diſinherited by any dubious or ambiguous words; there being required the utmoſt certainty of the teſtator's intentions to take away the right of an heir[q].

FROM the duty of maintenance we may eaſily paſs to that *of protection*, which is alſo a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this reſpect, working ſo ſtrongly as to need rather a check than a ſpur. A parent may, by our laws, maintain and uphold his children in their law-ſuits, without being guilty of the legal crime of maintaining quarrels[r]. A parent may alſo juſtify an aſſault and battery in defence of the perſons of his children[s]: nay, where a man's ſon was beaten by another boy, and the father went near a mile to find him, and there

[n] Lord Raym. 699.
[o] Com. Journ. 18 Feb. 12 Mar. 1707.
[p] 1 Ann. ſt. 1. c. 30.
[q] 1 Lev. 130.
[r] 2 Inſt. 564.
[s] 1 Hawk. P. C. 132.

(3) It was not held that ſhe was entitled to none, becauſe ſhe was the daughter of a jew, but becauſe the order did not ſtate that ſhe was poor, or likely to become chargeable to the pariſh.

revenged

revenged his ſon's quarrel by beating the other boy, of which beating he afterwards unfortunately died; it was not held to be murder, but manſlaughter merely [t]. Such indulgence does the law ſhew to the frailty of human nature, and the workings of parental affection.

THE laſt duty of parents to their children is that of giving them an *education* ſuitable to their ſtation in life: a duty pointed out by reaſon, and of far the greateſt importance of any. For, as Puffendorf very well obſerves [u], it is not eaſy to imagine or allow, that a parent has conferred any [451] conſiderable benefit upon his child by bringing him into the world; if he afterwards entirely neglects his culture and education, and ſuffers him to grow up like a mere beaſt, to lead a life uſeleſs to others, and ſhameful to himſelf. Yet the municipal laws of moſt countries ſeem to be defective in this point, by not conſtraining the parent to beſtow a proper education upon his children. Perhaps they thought it puniſhment enough to leave the parent, who neglects the inſtruction of his family, to labour under thoſe griefs and inconveniencies, which his family, ſo uninſtructed, will be ſure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one inſtance made a wiſe proviſion for breeding up the riſing generation: ſince the poor and laborious part of the community, when paſt the age of nurture, are taken out of the hands of their parents, by the ſtatutes for apprenticing poor children [w]; and are placed out by the public in ſuch a manner, as may render their abilities, in their ſeveral ſtations, of the greateſt advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or diſgraces to their family. Yet in one caſe, that of religion, they are under peculiar reſtrictions: for [x] it is provided, that if any perſon ſends any child under his government beyond the ſeas, either to prevent it's good education in England, or in order to enter into or reſide

[t] Cro Jac. 296. 1 Hawk P.C. 83.
[u] L. of N. b. 6. c. 2. § 12.
[w] See pag. 426.
[x] Stat. 1 Jac. I. c. 4. & 3 Jac. I. c. 5.

in any popiſh college, or to be inſtructed, perſuaded, or ſtrengthened in the popiſh religion; in ſuch caſe, beſides the diſabilities incurred by the child ſo ſent, the parent or perſon ſending ſhall forfeit 100*l.* which [y] ſhall go to the ſole uſe and benefit of him that ſhall diſcover the offence. And [z] if any parent, or other, ſhall ſend or convey any perſon beyond ſea, to enter into, or be reſident in, or trained up in, any priory, abbey, nunnery, popiſh univerſity, college, or ſchool, or houſe of jeſuits, or prieſts, or in any private popiſh family, in order to be inſtructed, perſuaded, or confirmed in the
[452] popiſh religion; or ſhall contribute any thing towards their maintenance when abroad by any pretext whatever, the perſon both ſending and ſent ſhall be diſabled to ſue in law or equity, or to be executor or adminiſtrator to any perſon, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and ſhall forfeit all his goods and chattels, and likewiſe all his real eſtate for life (4).

2. THE *power* of parents over their children is derived from the former conſideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful diſcharge of it. And upon this ſcore the municipal laws of ſome nations have given a much larger authority to the parents, than others. The antient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had alſo the power of taking away [a]. But the rigor of theſe laws was ſoftened by ſubſequent conſtitutions; ſo that [b] we find a father baniſhed by the emperor Hadrian for killing his ſon, though he had committed a very heinous crime, upon this maxim, that "*patria poteſtas in*

[y] Stat. 11 & 12 W. III. c. 4.
[z] Stat. 3 Car. I. c. 2.
[a] *Ff.* 28. 2. 11. *C.d.* 8. 47. 10.
[b] *Ff.* 48. 9. 5.

(4) By the 31 Geo. III. c. 32. No perſon profeſſing the Roman catholic religion, who ſhall take and ſubſcribe the oath required by that ſtatute, ſhall be ſubject to the penalties in the ſtatutes referred to in the preceding page.

"*pietate*

"*pietate debet, non in atrocitate, confiſtere.*" But ſtill they maintained to the laſt a very large and abſolute authority: for a ſon could not acquire any property of his own during the life of his father; but all his acquiſitions belonged to the father, or at leaſt the profits of them for his life [c].

THE power of a parent by our Engliſh laws is much more moderate; but ſtill ſufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reaſonable manner [d]; for this is for the benefit of his education. The conſent or concurrence of the parent to the marriage of his child under age, was alſo *directed* by our antient law to be obtained: but now it is abſolutely *neceſſary*: for without it the contract is void [e]. And this alſo is another means, which the law has put into the parent's hands, in order the better to diſcharge his duty; firſt, of protecting his [453] children from the ſnares of artful and deſigning perſons; and, next, of ſettling them properly in life, by preventing the ill conſequences of too early and precipitate marriages. A father has no other power over his ſon's *eſtate*, than as his truſtee or guardian; for, though he may receive the profits during the child's minority, yet he muſt account for them when he comes of age (5). He may indeed have the benefit of his children's labour while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or ſervants. The legal power of a father (for a mother, as ſuch, is entitled to no power, but only to reverence

[c] *Inſt.* 2. 9. 1.
[d] 1 Hawk. P. C. 130.
[e] Stat. 26 Geo. II. c. 33.

(5) Where children have fortunes independent of their parents, lord Thurlow declared, that it was the practice in chancery to refer it to the maſter, to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and this practice did not vary where a maintenance was directly given by the will, unleſs in caſes where it was given to the father; under which circumſtance it was a legacy to him. 1 *Bro.* 388.

and

and reſpect) the power of a father, I ſay, over the perſons of his children ceaſes at the age of twenty-one: for they are then enfranchiſed by arriving at years of diſcretion, or that point which the law has eſtabliſhed (as ſome muſt neceſſarily be eſtabliſhed) when the empire of the father, or other guardian, gives place to the empire of reaſon. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may alſo delegate part of his parental authority, during his life, to the tutor or ſchoolmaſter of his child; who is then *in loco parentis*, and has ſuch a portion of the power of the parent committed to his charge, *viz.* that of reſtraint and correction, as may be neceſſary to anſwer the purpoſes for which he is employed.

3. THE *duties* of children to their parents ariſe from a principle of natural juſtice and retribution. For to thoſe, who gave us exiſtence, we naturally owe ſubjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakneſs of our infancy, are entitled to our protection in the infirmity of their age; they who by ſuſtenance and education have enabled their offspring to proſper, ought in return to be ſupported by that offspring in caſe they ſtand in need of aſſiſtance. Upon this principle proceed all the duties of children to their parents which are
[454] enjoined by poſitive laws. And the Athenian laws[f] carried this principle into practice with a ſcrupulous kind of nicety: obliging all children to provide for their father, when fallen into poverty; with an exception to ſpurious children, to thoſe whoſe chaſtity had been proſtituted by conſent of the father, and to thoſe whom he had not put in any way of gaining a livelyhood. The legiſlature, ſays baron Monteſquieu[g], conſidered, that in the firſt caſe the father, being uncertain, had rendered the natural obligation precarious; that in the ſecond caſe, he had ſullied the life he had given, and done his children the greateſt of injuries, in depriving them of their reputation; and that, in the third caſe, he had

[f] Potter's Antiq. b. 4 c. 15. [g] Sp. L. b. 26. c. 5.

rendered

rendered their life (ſo far as in him lay) an inſupportable burthen, by furniſhing them with no means of ſubſiſtence.

OUR laws agree with thoſe of Athens with regard to the firſt only of theſe particulars, the caſe of ſpurious iſſue. In the other caſes the law does not hold the tie of nature to be diſſolved by any miſbehaviour of the parent; and therefore a child is equally juſtifiable in defending the perſon, or maintaining the cauſe or ſuit of a bad parent, as a good one; and is equally compellable[h], if of ſufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has ſhewn the greateſt tenderneſs and parental piety (6).

II. WE are next to conſider the caſe of illegitimate children, or baſtards; with regard to whom let us inquire, 1. Who are baſtards. 2. The legal duties of the parents towards a baſtard child. 3. The rights and incapacities attending ſuch baſtard children.

1. WHO are baſtards. A baſtard, by our Engliſh laws, is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a baſtard, if the parents afterwards intermarry[i]: and herein they differ moſt materially from our law; which, though not ſo ſtrict as to require that the child ſhall be *begotten*, [455] yet makes it an indiſpenſable condition, to make it legitimate,

[h] Stat. 43 Eliz. c. 2. [i] *Inſt.* 1. 10. 13. *Decret. l.* 4. *t.* 17. c. 1.

(6) The words of the ſtatute are, "the father and grandfather, "mother and grandmother, and children of every poor and impo- "tent perſon," &c. from which words, and a former ſtatute, Dr. Burn is inclined to think, even contrary to the opinion of lord Holt, that a grandchild is not compellable to relieve an indigent grandfather: but I ſhould entertain no doubt but the court of king's bench would determine the duty to be reciprocal; and would conſtrue any ambiguous expreſſion in favour of the diſcharge of ſuch a natural and moral obligation.

that

that it ſhall be *born*, after lawful wedlock. And the reaſon of our Engliſh law is ſurely much ſuperior to that of the Roman, if we conſider the principal end and deſign of eſtabliſhing the contract of marriage, taken in a civil light; abſtractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and deſign of marriage therefore being to aſcertain and fix upon ſome certain perſon, to whom the care, the protection, the maintenance, and the education of the children ſhould belong; this end is undoubtedly better anſwered by legitimating all iſſue born after wedlock, than by legitimating all iſſue of the ſame parties, even born before wedlock, ſo as wedlock afterwards enſues; 1. Becauſe of the very great uncertainty there will generally be, in the proof that the iſſue was really begotten by the ſame man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain, what child is legitimate, and who is to take care of the child. 2. Becauſe by the Roman law a child may be continued a baſtard, or made legitimate at the option of the father and mother, by a marriage *ex poſt facto*; thereby opening a door to many frauds and partialities which by our law are prevented. 3. Becauſe by thoſe laws a man may remain a baſtard till forty years of age, and then become legitimate, by the ſubſequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally fruſtrated. 4. Becauſe this rule of the Roman law admits of no limitations as to the time or number of baſtards ſo to be legitimated; but a dozen of them may, twenty years after their birth, by the ſubſequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great diſcouragement to the matrimonial ſtate; to which one main inducement is uſually not only the deſire of having *children*, but alſo the deſire of procreating lawful *heirs*. Whereas our conſtitutions guard againſt this indecency, and at the ſame time give ſufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are ſingle, and they will endeavour to make an early reparation for the offence, by marrying within a few months

months after, our law is ſo indulgent as not to baſtardize the child, if it be born, though not begotten, in lawful wedlock; for this is an incident that can happen but once, ſince all future children will be begotten, as well as born, within the rules of honour and civil ſociety. Upon reaſons like theſe we may ſuppoſe the peers to have acted at the parliament of Merton, when they refuſed to enact that children born before marriage ſhould be eſteemed legitimate [k].

FROM what has been ſaid it appears, that all children born before matrimony are baſtards by our law: and ſo it is of all children born ſo long after the death of the huſband, that, by the uſual courſe of geſtation, they could not be begotten by him. But, this being a matter of ſome uncertainty, the law is not exact as to a few days [l]. And this gives occaſion to a proceeding at common law, where a widow is ſuſpected to feign herſelf with child, in order to produce a ſuppoſititious heir to the eſtate: an attempt which the rigour of the Gothic conſtitutions eſteemed equivalent to the moſt atrocious theft, and therefore puniſhed with death [m]. In this caſe with us the heir preſumptive may have a writ *de ventre inſpiciendo*, to examine whether ſhe be with child or not [n] (7); and, if ſhe be, to keep her under proper reſtraint, till delivered; which is entirely conformable to the practice of the civil law [o]: but, if the wi-

[k] *Rogaverunt omnes epiſcopi magnates, ut conſentirent quod nati ante matrimonium eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium, quia eccleſia talis habet pro legitimis. Et omnes comites et barones una voce reſponderunt, quod nolunt leges Angliae mutare, quae hucuſque uſitatae ſunt et approbatae.* Stat. 20 Hen. III. c. 9. See the introduction to the great charter, *edit. Oxon.* 1759. *ſub anno* 1253.

[l] Cro. Jac. 541.

[m] Stiernhook *de jure Gothor. l.* 3. *c.* 5.

[n] Co. Litt. 8. Bract. *l.* 2. *c.* 32.

[o] *Ff.* 25. *tit.* 4. *per tot.*

(7) In a caſe, where an eſtate was deviſed to a male child which might be born within forty weeks after the death of the teſtator of a married woman, whoſe huſband had been long abroad, and if no ſuch child, the eſtate was deviſed over, this writ *de ventre inſpiciendo* was awarded againſt the woman on the petition of the ſubſequent deviſee. 4 *Bro.* 90. See the proceedings under this writ, 2 *P. Wms.* 591.

dow

dow be upon due examination found not pregnant, the presumptive heir ſhall be admitted to the inheritance, though liable to loſe it again, on the birth of a child within forty weeks from the death of a huſband [p]. But if a man dies, and his widow ſoon after marries again, and a child is born within ſuch a time, as that by the courſe of nature it might have been the child of either huſband; in this caſe he is ſaid to be more
[457] than ordinarily legitimate; for he may, when he arrives to years of diſcretion, chooſe which of the fathers he pleaſes [q]. To prevent this, among other inconveniencies, the civil law ordained that no widow ſhall marry *infra annum luctus* [r], a rule which obtained ſo early as the reign of Auguſtus [s], if not of Romulus: and the ſame conſtitution was probably handed down to our early anceſtors from the Romans, during their ſtay in this iſland; for we find it eſtabliſhed under the Saxon and Daniſh governments [t].

As baſtards may be born before the coverture or marriage ſtate is begun, or after it is determined, ſo alſo children born during wedlock may in ſome circumſtances be baſtards. As if the huſband be out of the kingdom of England, (or, as the law ſomewhat looſely phraſes it, *extra quatuor maria*) for above nine months, ſo that no acceſs to his wife can be preſumed, her iſſue during that period ſhall be baſtards [v]. But, generally, during the coverture acceſs of the huſband ſhall be preſumed, unleſs the contrary can be ſhewn [u]; which is ſuch a negative as can only be proved by ſhewing him to be elſewhere: for the general rule is, *praeſumitur pro legitimatione* [w](8). In a divorce, *a menſa et thoro*, if the wife breeds

[p] Britton. *c.* 66. *pag.* 166.
[q] Co. Litt. 8.
[r] *Cod.* 5. 9. 2.
[s] But the year was then only *ten* months. Ovid. *Faſt. I.* 27.
[t] *Sit omnis vidua ſine marito duodecim menſes. L. L. Ethelr. A. D.* 1008. *L. L. Canut. c.* 71.
[v] Co. Litt. 244.
[u] Salk. 123. 3 P. W. 276. Stra. 925.
[w] 5 Rep. 98.

(8) It uſed to be held, that, when the huſband was living within the kingdom, acceſs ſhould be preſumed, unleſs ſtrict proof was adduced that the huſband and wife were all the time living at a

6 diſtance

children, they are baſtards; for the law will preſume the huſband and wife conformable to the ſentence of ſeparation, unleſs acceſs be proved: but, in a voluntary ſeparation by agreement, the law will ſuppoſe acceſs, unleſs the negative be ſhewn [x]. So alſo if there is an apparent impoſſibility of procreation on the part of the huſband, as if he be only eight years old, or the like, there the iſſue of the wife ſhall be baſtards [y]. Likewiſe, in caſe of divorce in the ſpiritual court *a vinculo matrimonii*, all the iſſue born during the coverture are baſtards [z]; becauſe ſuch divorce is always upon ſome cauſe, that rendered [458] the marriage unlawful and null from the beginning.

2. LET us next ſee the duty of parents to their baſtard children, by our law; which is principally that of maintenance. For, though baſtards are not looked upon as children to any civil purpoſes, yet the ties of nature, of which maintenance is one, are not ſo eaſily diſſolved: and they hold indeed as to many other intentions; as, particularly, that a man ſhall not marry his baſtard ſiſter or daughter [a]. The civil law, therefore, when it denied maintenance to baſtards begotten under certain atrocious circumſtances [b], was neither conſonant to nature, nor reaſon; however profligate and wicked the parents might juſtly be eſteemed.

THE method in which the Engliſh law provides maintenance for them is as follows [c]. When a woman is delivered, or declares herſelf with child, of a baſtard, and will by oath before a juſtice of peace charge any perſon as having got her

[x] Salk. 123.
[y] Co. Litt. 244.
[z] *Ibid.* 235.
[a] Lord Raym. 68. Comb. 356.
[b] *Nov.* 89. *c.* 15.
[c] Stat. 18 Eliz. c. 3. 7 Jac. I. c. 4. 3 Car. I. c. 4. 13 & 14 Car. II. c. 12. 6 Geo. II. c. 31.

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diſtance from each other; but the courts have relaxed that rule, and have gone the length of holding that the legitimacy or illegitimacy of the child of a married woman, living in a notorious ſtate of adultery, under all the circumſtances, is a queſtion for a jury to determine. 4 *T. R.* 356. and 251.

with

with child, the juſtice ſhall cauſe ſuch perſon to be apprehended, and commit him till he gives ſecurity, either to maintain the child (9), or appear at the next quarter ſeſſions to diſpute and try the fact. But if the woman dies, or is married before delivery, or miſcarries, or proves not to have been with child, the perſon ſhall be diſcharged (10): otherwiſe the ſeſſions, or two juſtices out of ſeſſions, upon original application to them, may take order for the keeping of the baſtard, by charging the mother or the reputed father with the payment of money or other ſuſtentation for that purpoſe And if ſuch putative father, or lewd mother, run away from the pariſh, the overſeers by direction of two juſtices may ſeize their rents, goods, and chattels, in order to bring up the ſaid baſtard child. Yet ſuch is the humanity of our laws, that no woman can be compulſively queſtioned concerning the father of her child, till one month after her delivery: which indulgence is however very frequently a hardſhip upon pariſhes, by giving the parents opportunity to eſcape.

[459] 3. I PROCEED next to the rights and incapacities which appertain to a baſtard. The rights are very few, being only ſuch as he can *acquire;* for he can *inherit* nothing, being looked upon as the ſon of nobody; and ſometimes called *filius nullius*, ſometimes *filius populi*[d] (11). Yet he may gain a ſir-

[d] *Fort. de L. L. c.* 40.

(9) If he gives a bond to indemnify the pariſh, and neglects to provide maintenance for the child, the pariſh officers may relieve it without an order from a juſtice, and may recover the money advanced in an action upon the bond. *H. Bl.* 253.

(10) Or he ſhall be diſcharged, if the juſtices at the ſeſſions, upon hearing all the circumſtances of the caſe, ſhall be of opinion that he is not the father of the child.

(11) But though he is conſidered *filius nullius* with reſpect to inheritances and ſucceſſions, yet the law takes notice of his connection with his natural parents for ſome other purpoſes, as it has been decided that if a baſtard marries under age by licence, he muſt have the conſent of his putative father, guardian, or mother, according to the 26 Geo. II. c. 33. 1 *T. R.* 96.

name

name by reputation [e], though he has none by inheritance. All other children have their primary ſettlement in their father's pariſh; but a baſtard in the pariſh where born, for he hath no father [f]. However, in caſe of fraud, as if a woman be ſent either by order of juſtices, or comes to beg as a vagrant, to a pariſh which ſhe does not belong to, and drops her baſtard there; the baſtard ſhall, in the firſt caſe, be ſettled in the pariſh from whence ſhe was illegally removed [g]: or, in the latter caſe, in the mother's own pariſh, if the mother be apprehended for her vagrancy [h]. Baſtards alſo born in any licenſed hoſpital for pregnant women, are ſettled in the pariſhes to which the mothers belong [i]. The incapacity of a baſtard conſiſts principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no anceſtor from whom any inheritable blood can be derived. A baſtard was alſo, in ſtrictneſs, incapable of holy orders; and, though that were diſpenſed with, yet he was utterly diſqualified from holding any dignity in the church [k]: but this doctrine ſeems now obſolete; and in all other reſpects, there is no diſtinction between a baſtard and another man (12). And really any other diſtinction, but that of not inheriting, which civil policy renders neceſſary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjuſt, and cruel to the laſt degree: and yet the civil law, ſo boaſted of for it's equitable deciſions, made baſtards in ſome caſes incapable even of a gift from their parents [l]. A baſtard may, laſtly, be made legitimate, and capable of inheriting, by the tranſcendent power of an act of parliament, and not otherwiſe [m]: as was done in the caſe of John of Gaunt's baſtard children, by a ſtatute of Richard the ſecond.

[e] Co. Litt. 3.
[f] Salk. 427.
[g] *Ibid.* 121.
[h] Stat. 17 Geo. II. c. 5.
[i] Stat. 13 Geo. III. c. 82.
[k] Forteſc. c. 40. 5 Rep. 58.
[l] *Cod.* 6. 57. 5.
[m] 4 Inſt. 36.

(12) Baſtards are not favoured in equity as legitimate children. The court will not ſupply the defect of a ſurrender of a copyhold in a conveyance or deviſe by a father to a natural child, as it will in favour of a legitimate child. *Gilb. For. Rom.* 256. 2 *Veſ.* 582. See farther concerning baſtards, 2 vol. 247, & 506.

CHAPTER THE SEVENTEENTH.

OF GUARDIAN AND WARD.

THE only general private relation, now remaining to be diſcuſſed, is that of guardian and ward; which bears a very near reſemblance to the laſt, and is plainly derived out of it: the guardian being only a temporary parent, that is, for ſo long time as the ward is an infant, or under age. In examining this ſpecies of relationſhip, I ſhall firſt conſider the different kinds of guardians, how they are appointed, and their power and duty: next, the different ages of perſons, as defined by the law: and laſtly, the privileges and diſabilities of an infant, or one under age and ſubject to guardianſhip.

I. THE guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the perſon, the *curator* the committee of the eſtate. But this office was frequently united in the civil law[a]; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept diſtinct.

[a] *Ff.* 26. 4. 1.

OF

Of the ſeveral ſpecies of guardians, the firſt are guardians *by nature*: viz. the father and (in ſome caſes) the mother of the child. For if an eſtate be left to an infant, the father is by common law the guardian, and muſt account to his child for the profits[b] (1). And, with regard to daughters, it ſeems by conſtruction of the ſtatute 4 & 5 Ph. & Mar. c. 8. that the father might by deed or will aſſign a guardian to any woman-child under the age of ſixteen; and, if none be ſo aſſigned, the mother ſhall in this caſe be guardian[c]. There are alſo guardians *for nurture*[d]; which are, of courſe, the father or mother, till the infant attains the age of fourteen years[e]: and in default of father or mother, the ordinary uſually aſſigns ſome diſcreet perſon to take care of the infant's perſonal eſtate, and to provide for his maintenance and education[f]. Next are guardians *in ſocage*, (an appellation which will be fully explained in the ſecond book of theſe commentaries) who are alſo called guardians *by the common law*. Theſe take place only when the minor is entitled to ſome eſtate in lands, and then by the common law the guardianſhip devolves upon his next of kin, to whom the inheritance cannot poſſibly deſcend; as, where the eſtate deſcended from his father, in this caſe his uncle by the mother's ſide cannot poſſibly inherit this eſtate, and therefore ſhall be the guardian[g]. For the law judges it improper to truſt the perſon of an infant in his hands, who may by poſſibility become heir to him; that there may be no temptation, nor even ſuſpicion of temptation, for him to abuſe his truſt[h]. The Roman laws proceed on a quite contrary principle, committing the care

[b] Co. Litt. 88.
[c] 3 Rep. 39.
[d] Co. Litt. 88.
[e] Moor 738. 3 Rep. 38.
[f] 2 Jones 90. 2 Lev. 163.
[g] Litt. § 123.
[h] *Nunquam cuſtodia alicujus de jure alicui remanet, de quo habeatur ſuſpicio, quod poſſit vel velit aliquod jus in ipſa hereditate clamare.* Glanv. *l.* 7. *c.* 11.

(1) But an executor is not juſtified in paying to the father a legacy left to the child; and if he pays it to the father, and the father becomes inſolvent, he may be compelled to pay it over again. 1 *P. Wms.* 285.

of the minor to him who is the next to ſucceed to the inheritance, preſuming that the next heir would take the beſt care of an eſtate, to which he has a proſpect of ſucceeding: and this they boaſt to be "*ſumma providentia*[l]." But in the mean time they ſeem to have forgotten, how much it is the
[462] guardian's intereſt to remove the incumbrance of his pupil's life from that eſtate for which he is ſuppoſed to have ſo great a regard[k]. And this affords Forteſcue[l], and ſir Edward Coke[m], an ample opportunity for triumph; they affirming, that to commit the cuſtody of an infant to him that is next in ſucceſſion is "*quaſi agnum committere lupo, ad de-*"*vorandum*[n] (2)." Theſe guardians in focage, like thoſe for

[l] *Ff.* 26. 4. 1.

[k] The Roman ſatyriſt was fully aware of this danger, when he puts this private prayer into the mouth of a ſelfiſh guardian;

— *pupillum e utinam, quem proximus haeres*
Impello, expungam. Perſ. 1. 12.

[l] *c.* 44.

[m] 1 Inſt. 88.

[n] See Stat. *Hibern.* 14 Hen. III. This policy of our Engliſh law is warranted by the wiſe inſtitutions of Solon, who provided that no one ſhould be another's guardian, who was to enjoy the eſtate after his death. (Potter's Antiq. b. 1. c. 26.) And Charondas, mother of the Grecian legiſlators, directed that the inheritance ſhould go to the father's relations, but the education of the child to the mother's; that the guardianſhip and right of ſucceſſion might always be kept diſtinct. (Petit. *Leg. Att.* l. 6. t. 7.)

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(2) Lord chancellor Macclesfield has vehemently condemned the rule of our law, that the next of kin, to whom the land cannot deſcend, is to be the guardian in focage; and has declared, that "it "is not grounded upon reaſon, but prevailed in barbarous times, "before the nation was civilized." 2 *P. Wms.* 262. But as the law has placed the cuſtody of the infant under the care of one who is juſt as likely to be in a near degree of kindred as the heir; one who probably will have the ſame affection for his perſon, without having any intereſt in even wiſhing his death, and therefore removed from all ſuſpicion, however ill-founded; I cannot but think there is more wiſdom in placing the infant under the guardianſhip of ſuch a relation, than under that of the next heir.

A focage guardian can only be where the infant takes lands by deſcent. If he has lands by deſcent both *ex parte paterna* and *ex parte materna*, then the next of kin on each ſide ſhall, reſpectively, be guardians

nurture, continue only till the minor is fourteen years of age; for then, in both caſes, he is preſumed to have diſcretion, ſo far as to chooſe his own guardian. This he may do, unleſs one be appointed by the father, by virtue of the ſtatute 12 Car. II. c. 24. which, conſidering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianſhip *in chivalry* (which laſted till the age of twenty-one, and of which we ſhall ſpeak hereafter) enacts, that any father, under age or of full age, may by deed or will diſpoſe of the cuſtody of his child, either born or unborn, to any perſon, except a popiſh recuſant, either in poſſeſſion or reverſion, till ſuch child attains the age of one and twenty years (3). Theſe are called guardians *by ſtatute*, or *teſtamentary* guardians. There are alſo ſpecial guardians *by cuſtom* of London, and other places [o]; but they are particular exceptions, and do not fall under the general law.

THE power and reciprocal duty of a guardian and ward are the ſame, *pro tempore*, as that of a father and child; and therefore I ſhall not repeat them: but ſhall only add, that

[o] Co. Litt. 88.

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dians by ſocage of theſe lands; and of theſe two claimants the firſt occupant ſhall retain the cuſtody of the infant's perſon. See Mr. Hargrave's notes to Co. Litt. 88. b. where theſe different kinds of guardianſhip are with great learning and perſpicuity diſcriminated and diſcuſſed.

(3) By this ſtatute, the father may diſpoſe of the guardianſhip of any child unmarried under the age of twenty-one, by dead or will, executed in the preſence of two or more witneſſes, till ſuch child attains the age of twenty-one, or for any leſs time. And the guardian ſo appointed has the tuition of the ward, and the management of his eſtate and property.

A father cannot appoint guardians under this ſtatute to a natural child; but where he has named guardians by his will to an illegitimate child, the court of chancery will appoint the ſame perſons guardians without any reference to a maſter for his approbation. 2 *Bro.* 583.

the guardian, when the ward comes of age, is bound to give him an account of all that he has tranſacted on his behalf, and muſt anſwer for all loſſes by his wilful default or negligence. In order therefore to prevent diſagreeable conteſts with young gentlemen, it has become a practice for many guardians, of large eſtates eſpecially, to indemnify themſelves by applying to the court of chancery, acting under it's direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and ſupreme guardian of all infants, as well as idiots aud lunatics; that is, of all ſuch perſons as have not diſcretion enough to manage their own concerns. In caſe therefore any guardian abuſes his truſt, the court will check and puniſh him; nay ſometimes will proceed to the removal of him, and appoint another in his ſtead [p].

2. LET us next conſider the ward or perſon within age, for whoſe aſſiſtance and ſupport theſe guardians are conſtituted by law; who it is, that is ſaid to be within age. The ages of male and female are different for different purpoſes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of diſcretion, and therefore may conſent or diſagree to marriage, may chooſe his guardian, and, if his diſcretion be actually proved, may make his teſtament of his perſonal eſtate; at *ſeventeen* may be an executor; and at *twenty-one* is at his own diſpoſal, and may alien his lands, goods, and chattels. A female alſo at *ſeven* years of age may be betrothed, or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may conſent or diſagree to marriage, and, if proved to have ſufficient diſcretion, may bequeath her perſonal eſtate; at *fourteen* is at years of legal diſcretion, and may chooſe a guardian; at *ſeventeen* may be executrix; and at *twenty-one* may diſpoſe of herſelf and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniverſary of a perſon's

[p] 1 Sid. 424. 1 P. Will. 703.

birth;

birth[q](4); who till that time is an infant, and ſo ſtiled in law. Among the antient Greeks and Romans *women* were never of age, but ſubject to perpetual guardianſhip[r], unleſs when [464] married "*niſi conveniſſent in manum viri*:" and, when that perpetual tutelage wore away in proceſs of time, we find that, in females as well as males, full age was not till twenty-five years[s]. Thus by the conſtitution of different kingdoms, this period, which is merely arbitrary, and *juris poſitivi*, is fixed at different times. Scotland agrees with England in this point; (both probably copying from the old Saxon conſtitutions on the continent, which extended the age of minority "*ad annum vigeſimum primum, et eo uſque juvenes ſub "tutelam reponunt*"" but in Naples they are of full age at *eighteen*, in France, with regard to marriage, not till *thirty*: and in Holland at *twenty-five*.

3. INFANTS have various privileges, and various diſabilities: but their very diſabilities are privileges; in order to ſecure them from hurting themſelves by their own improvident acts. An infant cannot be ſued but under the protection, and joining the name, of his guardian; for he is to defend him againſt all attacks as well by law as otherwiſe[u]: but he may ſue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any perſon who will undertake the infant's cauſe; and it

[q] Salk. 44. 625. Lord. Raym. 480. 1096. Toder v. Sanſam. *Dom. Proc.* 27 Feb. 1775.

[r] Pott. Antiq. b. 4. c. 11. Cic. *pro Muren.* 12.

[s] *Inſt.* 1. 23. 1.

[t] Stiernhook *de jure Sueonum. l.* 2. *c.* 2. This is alſo the period when the king, as well as the ſubject, arrives at full age in modern Sweden. Mod. Univerſ. Hiſt. xxxiii. 220.

[u] Co. Litt. 135.

(4) If he is born on the 1ſt of January, he is of age to do any legal act on the morning of the laſt day of December, though he may not have lived twenty-one years by near forty-eight hours: the reaſon aſſigned is, that in law there is no fraction of a day; and if the birth were on the firſt ſecond of one day, and the act on the laſt ſecond of the other, then twenty-one years would be complete; and in the law it is the ſame whether a thing is done upon one moment of the day or on another.

frequently happens, that an infant, by his *prochein amy*, inſtitutes a ſuit in equity againſt a fraudulent guardian. In criminal caſes, an infant of the age of *fourteen* years may be capitally puniſhed for any capital offence [w]; but under the age of *ſeven* he cannot. The period between *ſeven* and *fourteen* is ſubject to much uncertainty: for the infant ſhall, generally ſpeaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could diſcern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty
[465] or diſcretion [x]. And ſir Matthew Hale gives us two inſtances, one of a girl of thirteen, who was burned for killing her miſtreſs; another of a boy ſtill younger, that had killed his companion and hid himſelf, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could diſcern between good and evil: and in ſuch caſes the maxim of law is, that *malitia ſupplet ætatem* (5). So alſo, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper ſubject for capital puniſhment, by the opinion of all the judges [y].

WITH regard to eſtates and civil property, an infant hath many privileges, which will be better underſtood when we come to treat more particularly of thoſe matters; but this may be ſaid in general, that an infant ſhall loſe nothing by non-claim, or neglect of demanding his right; nor ſhall any other *laches* or negligence be imputed to an infant, except in ſome very particular caſes.

IT is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any

[w] 1 Hal. P. C. 25. [y] Foſter. 72.
[x] *Ibid.* 26.

(5) In ſuch caſes, I conceive that juſtice tempered with mercy would inquire whether the malice is of ſuch a hardened degree that a ſlighter puniſhment would not eradicate or correct it, and whether a milder ſentence would not be ſufficient to deter other boys of the ſame age from a repetition of the crime.

manner

manner of contract, that will bind him. But ſtill to all theſe rules there are ſome exceptions: part of which were juſt now mentioned in reckoning up the different capacities which they aſſume at different ages: and there are others, a few of which it may not be improper to recite, as a general ſpecimen of the whole. And, firſt, it is true, that infants cannot aliene their eſtates: but infant truſtees, or mortagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the eſtates they hold in truſt or mortgage, to ſuch perſon as the court ſhall appoint[z]. Alſo it is generally true, that an infant can do no legal act: yet, an infant, who has an advowſon, may preſent to the benefice when it becomes void[a]. For the law in this caſe diſpenſes with one rule, in order to maintain others of far greater conſequence: it permits an infant to preſent a clerk [466] (who, if unfit, may be rejected by the biſhop) rather than either ſuffer the church to be unſerved till he comes of age, or permit the infant to be debarred of his right by lapſe to the biſhop. An infant may alſo purchaſe lands, but his purchaſe is incomplete: for, when he comes to age, he may either agree or diſagree to it, as he thinks prudent or proper, without alleging any reaſon; and ſo may his heirs after him, if he dies without having completed his agreement[b]. It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable; yet in ſome caſes[c] he may bind himſelf apprentice by deed indented or indentures, for ſeven years; and[d] he may by deed or will appoint a guardian to his children, if he has any. Laſtly, it is generally true, that an infant can make no other contract that will bind him: yet he may bind himſelf to pay for his neceſſary meat, drink, apparel, phyſic, and ſuch other neceſſaries (6); and likewiſe for his good teaching and inſtruction,

[z] Stat. 7 Ann. c. 19. 4 Geo. III. c. 16.
[a] Co. Litt. 172.
[b] *Ibid.* 2.
[c] Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.
[d] Stat. 12 Car. II. c. 24.

(6) It has been held, than an infant is not liable to repay money lent to him, although he ſhould lay it out in neceſſaries. 1 *Salk.* 386.

whereby he may profit himſelf afterwards [e]. And thus much, at preſent, for the privileges and diſabilities of infants.

[e] Co. Litt. 172.

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386. Nor is he bound to pay for goods bought to trade with. *Bull. N. P.* 154. But debts contracted during infancy are a good conſideration to ſupport a promiſe made to pay them, when a perſon is full of age. Infancy may be given in evidence upon the general iſſue, or it may be pleaded. *Bull.* 152.

And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promiſe or contract when he was of age; the plaintiff need only prove the promiſe, and the defendant muſt diſcharge himſelf by proof of the infancy. 1 *T. R.* 648.

CHAPTER THE EIGHTEENTH.

OF CORPORATIONS.

WE have hitherto conſidered perſons in their natural capacities, and have treated of their rights and duties. But, as all perſonal rights die with the perſon; and, as the neceſſary forms of inveſting a ſeries of individuals, one after another, with the ſame identical rights, would be very inconvenient, if not impracticable; it has been found neceſſary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to conſtitute artificial perſons, who may maintain a perpetual ſucceſſion, and enjoy a kind of legal immortality.

THESE artificial perſons are called bodies politic, bodies corporate, (*corpora corporata,*) or corporations: of which there is a great variety ſubſiſting, for the advancement of religion, of learning, and of commerce; in order to preſerve entire and for ever thoſe rights and immunities, which, if they were granted only to thoſe individuals of which the body corporate is compoſed, would upon their death be utterly loſt and extinct. To ſhew the advantages of theſe incorporations, let us conſider the caſe of a college in either of our univerſities, founded *ad ſtudendum et orandum*, for the encouragement and ſupport of religion and learning. If this were a mere voluntary aſſembly, the individuals which compoſe it might indeed read, pray, ſtudy and perform ſcholaſtic exerciſes together, ſo long as they could agree to do ſo: but they could

could neither frame, nor receive any laws or rules of their conduct; none at leaſt, which would have any binding force, for want of a coerceive power to create a ſufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if ſuch privileges be attacked, which of all this unconnected aſſembly has the right, or ability, to defend them? And, when they are diſperſed by death or otherwiſe, how ſhall they transfer theſe advantages to another ſet of ſtudents, equally unconnected as themſelves? So alſo with regard to holding eſtates or other property, if land be granted for the purpoſes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other perſons for the ſame purpoſes, but by endleſs conveyances from one to the other, as often as the hands are changed. But when they are conſolidated and united into a corporation, they and their ſucceſſors are then conſidered as one perſon in law: as one perſon, they have one will, which is collected from the ſenſe of the majority of the individuals: this one will may eſtabliſh rules and orders for the regulation of the whole, which are a ſort of municipal laws of this little republic; or rules and ſtatutes may be preſcribed to it at it's creation, which are then in the place of natural laws: the privileges and immunities, the eſtates and poſſeſſions, of the corporation, when once veſted in them will be for ever veſted, without any new conveyance to new ſucceſſions; for all the individual members that have exiſted from the foundation to the preſent time, or that ſhall ever hereafter exiſt, are but one perſon in law, a perſon that never dies: in like manner as the river Thames is ſtill the ſame river, though the parts which compoſe it are changing every inſtant.

THE honour of originally inventing theſe political conſtitutions entirely belongs to the Romans. They were introduced, as Plutarch ſays, by Numa; who finding, upon his acceſſion, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic meaſure to ſubdivide theſe two into many ſmaller ones, by inſtituting

tuting ſeparate ſocieties of every manual trade and profeſſion. They were afterwards much conſidered by the civil law [a], in which they were called *univerſitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together: they were adopted alſo by the canon law, for the maintenance of eccleſiaſtical diſcipline; and from them our ſpiritual corporations are derived. But our laws have conſiderably refined and improved upon the invention, according to the uſual genius of the Engliſh nation: particularly with regard to ſole corporations, conſiſting of one perſon only, of which the Roman lawyers had no notion; their maxim being that "*tres faciunt collegium* [b]." Though they held, that if a corporation, originally conſiſting of three perſons, be reduced to one, "*ſi univerſitas ad unum redit*," it may ſtill ſubſiſt as a corporation, "*et ſtet nomen univerſitatis* [c]."

BEFORE we proceed to treat of the ſeveral incidents of corporations, as regarded by the laws of England, let us firſt take a view of the ſeveral ſorts of them; and then we ſhall be better enabled to apprehend their reſpective qualities.

THE firſt diviſion of corporation is into *aggregate* and *ſole*. Corporations aggregate conſiſt of many perſons united together into one ſociety, and are kept up by a perpetual ſucceſſion of members, ſo as to continue for ever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations ſole conſiſt of one perſon only and his ſucceſſors, in ſome particular ſtation, who are incorporated by law, in order to give them ſome legal capacities and advantages, particularly that of perpetuity, which in their natural perſons they could not have had. In this ſenſe the king is a ſole corporation [d]: ſo is a biſhop: ſo are ſome deans, and prebendaries, diſtinct from their ſeveral chapters: and ſo is every parſon and vicar. And the neceſſity, or at leaſt uſe, of this inſtitution will be very apparent, if we conſider the caſe of

[a] *Ff.* 1. 3. 1. 4. *per tot.*
[b] *Ff.* 50. 16. 8.
[c] *Ff.* 3, 4. 7.
[d] Co. Litt. 43.

a parſon

a parſon of a church. At the original endowment of pariſh churches, the freehold of the church, the church-yard, the parſonage houſe, the glebe, and the tithes of the pariſh, were veſted in the then parſon by the bounty of the donor, as a temporal recompenſe to him for his ſpiritual care of the inhabitants, and with intent that the ſame emoluments ſhould ever afterwards continue as a recompenſe for the ſame care. But how was this to be effected? The freehold was veſted in the parſon; and, if we ſuppoſe it veſted in his natural capacity, on his death it might deſcend to his heir, and would be liable to his debts and incumbrances: or, at beſt, the heir might be compellable, at ſome trouble and expenſe, to convey theſe rights to the ſucceeding incumbent. The law therefore has wiſely ordained, that the parſon, *quatenus* parſon, ſhall never die, any more than the king; by making him and his ſucceſſors a corporation. By which means all the original rights of the parſonage are preſerved entire to the ſucceſſor: for the preſent incumbent, and his predeceſſor who lived ſeven centuries ago, are in law one and the ſame perſon; and what was given to the one was given to the other alſo.

ANOTHER diviſion of incorporations, either ſole or aggregate, is into *eccleſiaſtical* and *lay*. Eccleſiaſtical corporations are where the members that compoſe it are entirely ſpiritual perſons; ſuch as biſhops; certain deans, and prebendaries; all archdeacons, parſons, and vicars; which are ſole corporations; deans and chapters at preſent, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. Theſe are erected for the furtherance of religion, and perpetuating the rights of the church. Lay corporations are of two ſorts, *civil* and *eleemoſynary*. The civil are ſuch as are erected for a variety of temporal purpoſes. The king, for inſtance, is made a corporation to prevent in general the poſſibility of an *interregnum* or vacancy of the throne, and to preſerve the poſſeſſions of the crown entire; for immediately upon the demiſe of one king, his ſucceſſor is, as we have formerly ſeen, in full poſſeſſion of the regal rights and dignity. Other lay corporations are erected for the good government of

a town or particular diſtrict, as a mayor and commonalty, bailiff and burgeſſes, or the like: ſome for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and ſome for the better carrying on of divers ſpecial purpoſes; as churchwardens, for conſervation of the goods of the pariſh; the college of phyſicians and company of ſurgeons in London, for the improvement of the medical ſcience; the royal ſociety, for the advancement of natural knowlege; and the ſociety of antiquaries, for promoting the ſtudy of antiquities. And among theſe I am inclined to think the general corporate bodies of the univerſities of Oxford and Cambridge muſt be ranked: for it is clear they are not ſpiritual or eccleſiaſtical corporations, being compoſed of more laymen than clergy: neither are they eleemoſynary foundations, though ſtipends are annexed to particular magiſtrates and profeſſors, any more than other corporations where the acting officers have ſtanding ſalaries; for theſe are rewards *pro opera et labore*, not charitable donations only, ſince every ſtipend is preceded by ſervice and duty: they ſeem therefore to be merely civil corporations (1). The eleemoſynary ſort are ſuch as are conſtituted for the perpetual diſtribution of the free alms, or bounty, of the founder of them to ſuch perſons as he has directed. Of this kind are all hoſpitals for the maintenance of the poor, ſick, and impotent: and all colleges, both *in* our univerſities and *out*[e] of them: which colleges are founded for two purpoſes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting aſſiſtance to the members of thoſe bodies, in order to enable them to proſecute their devotion and ſtudies with greater eaſe and aſſiduity. And all theſe eleemoſynary corporations are, ſtrictly ſpeaking, lay and not eccleſiaſtical, even though compoſed of eccleſiaſtical perſons[f], and although they in ſome things

[e] Such as at Mancheſter, Eton, Wincheſter, *&c.*

[f] 1 Lord Raym. 6.

(1) It is now fully eſtabliſhed that each univerſity is a civil corporation. 3 *Burr.* 1656.

partake

partake of the nature, privileges, and reſtrictions of eccleſiaſtical bodies (2).

[472] HAVING thus marſhalled the ſeveral ſpecies of corporations, let us next proceed to conſider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are viſited. And 4. How they may be diſſolved.

I. CORPORATIONS, by the civil law, ſeem to have been created by the mere act, and voluntary aſſociation of their members; provided ſuch convention was not contrary to law, for then it was *illicitum collegium* [g]. It does not appear that the prince's conſent was neceſſary to be actually given to the foundation of them; but merely that the original founders of theſe voluntary and friendly ſocieties (for they were little more than ſuch) ſhould not eſtabliſh any meetings in oppoſition to the laws of the ſtate.

BUT, with us in England, the king's conſent is abſolutely neceſſary to the erection of any corporation, either impliedly or expreſsly given [h]. The king's implied conſent is to be found in corporations which exiſt by force of the *common law*, to which our former kings are ſuppoſed to have given their concurrence; common law being nothing elſe but cuſtom, ariſing from the univerſal agreement of the whole community. Of this ſort are the king himſelf, all biſhops, parſons, vicars, churchwardens, and ſome others; who by common

[g] *Ff.* 47. 22. 1. *Neque ſocietas, neque collegium, neque hujuſmodi corpus paſſim omnibus habere conceditur; nam et legibus, et ſenatus conſultis, et principalibus conſtitutionibus ea res coercetur. Ff.* 3. 4. 1.

[h] Cities and towns were firſt erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century: (Robertſ. Cha. V. i. 30.) to which the conſent of the feodal ſovereign was abſolutely neceſſary, as many of his prerogatives and revenues were thereby conſiderably diminiſhed.

(2) They are lay corporations becauſe they are not ſubject to the juriſdiction of the eccleſiaſtical courts, or to the viſitations of the ordinary or dioceſan in their ſpiritual characters.

law have ever been held (as far as our books can ſhew us) to have been corporations, *virtute officii*: and this incorporation is ſo inſeparably annexed to their offices, that we cannot frame a complete legal idea of any of theſe perſons, but we muſt alſo have an idea of a corporation, capable to tranſmit his rights to his ſucceſſors, at the ſame time. Another me- [473] thod of implication, whereby the king's conſent is preſumed, is as to all corporations by *preſcription*, ſuch as the city of London, and many others [j], which have exiſted as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can ſhew no legal charter of incorporation, yet in caſes of ſuch high antiquity the law preſumes there once was one; and that by the variety of accidents, which a length of time may produce, the charter is loſt or deſtroyed. The methods by which the king's conſent is expreſsly given, are either by act of parliament or charter. By act of parliament, of which the royal aſſent is a neceſſary ingredient, corporations may undoubtedly be created [l]: but it is obſervable, that (till of late years) moſt of thoſe ſtatutes, which are uſually cited as having created corporations, do either confirm ſuch as have been before created by the king; as in the caſe of the college of phyſicians erected by charter 10 Hen. VIII [k], which charter was afterwards confirmed in parliament [l]; or, they permit the king to erect a corporation *in futuro* with ſuch and ſuch powers; as is the caſe of the bank of England [m], and the ſociety of the Britiſh fiſhery [n]. So that the immediate creative act was uſually performed by the king alone, in virtue of his royal prerogative [o].

ALL the other methods therefore whereby corporations exiſt, by common law, by preſcription, and by act of parliament, are for the moſt part reducible to this of the king's letters patent, or charter of incorporation. The king's crea-

j 2 Inſt. 330.
l 10 Rep. 29. 1 Roll. Abr. 512.
k 8 Rep. 114.
l 24 & 25 Hen. VIII. c. 5.
m Stat. 5 & 6 W. & M. c. 20.
n Stat. 23 Geo. II. c. 4.
o See page 272.

tion may be performed by the words "*creamus, erigimus, fundamus, incorporamus*," or the like. Nay it is held, that if
[474] the king grants to a ſet of men to have *gildam mercatoriam*, a mercantile meeting or aſſembly [p], this is alone ſufficient to incorporate and eſtabliſh them for ever [q].

THE parliament, we obſerved, by its abſolute and tranſcendent authority, may perform this, or any other act whatſoever: and actually did perform it to a great extent, by ſtatute 39 Eliz. c. 5. which incorporated all hoſpitals and houſes of correction founded by charitable perſons, without farther trouble: and the ſame has been done in other caſes of charitable foundations. But otherwiſe it has not formerly been uſual, thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleaſes. And, in the particular inſtance before-mentioned, it was done, as ſir Edward Coke obſerves [r], to avoid the charges of incorporation and licences of mortmain in ſmall benefactions; which in his days were grown ſo great, that they diſcouraged many men from undertaking theſe pious and charitable works.

THE king (it is ſaid) may grant to a ſubject the power of erecting corporations [s], though the contrary was formerly held [t]: that is, he may permit the ſubject to name the perſons and powers of the corporation at his pleaſure; but it is really the king that erects, and the ſubject is but the inſtrument: for though none but the king can make a corporation, yet *qui facit per alium, facit per ſe* [u]. In this manner the chancellor of the univerſity of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of ſeveral matriculated companies, now ſubſiſting, of tradeſmen ſubſervient to the ſtudents.

[p] *Gild* ſignified among the Saxons a fraternity, derived from the verb *gildan* to pay, becauſe every man paid his ſhare towards the expenſes of the community. And hence their place of meeting is frequently called the *Guild* or *Guild hall*.

[q] 10 Rep. 30. 1 Roll. Abr. 513.

[r] 2 Inſt. 722.

[s] Bro. *Abr. tit. Prerog.* 53. Viner. *Prerog.* 88. pl. 16.

[t] Yearbook, 2 Hen. VII. 13.

[u] 10 Rep. 33.

WHEN

WHEN a corporation is erected, a name muſt be given to it; and by that name alone it muſt ſue and be ſued, and do all legal acts; though a very minute variation therein is not [475] material[u]. Such name is the very being of it's conſtitution; and, though it is the will of the king that erects the corporation, yet the name is the knot of it's combination, without which it could not perform it's corporate functions[w]. The name of incorporation, ſays ſir Edward Coke, is as a proper name, or name of baptiſm; and therefore when a private founder gives his college or hoſpital a name, he does it only as a godfather; and by that ſame name the king baptizes the incorporation[x] (3).

II. AFTER a corporation is ſo formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to conſider. Some of theſe are neceſſarily and inſeparably incident to every corporation; which incidents, as ſoon as a corporation is duly erected, are tacitly annexed of courſe[y]. As, 1. To have perpetual ſucceſſion. This is the very end of it's incorporation: for there cannot be a ſucceſſion for ever without an incorporation[z]; and therefore all aggregate corporations have a power neceſſarily implied of electing members in the room of ſuch as go off[a] (4).

[u] 10 Rep. 122.
[w] Gilb. Hiſt. C. P. 182.
[x] 10 Rep. 28.
[y] *Ibid.* 30. Hob. 211.
[z] 10 Rep. 26.
[a] 1 Roll. Abr. 514.

(3) But it may have a name only by implication; as if the king ſhould incorporate the inhabitants of Dale with power to chuſe a mayor annually, though no name be given, yet it is a good corporation by the name of mayor and commonalty. 1 *Salk.* 191. And it may change its name, as corporations frequently do in new charters, and it ſtill retains its former rights and privileges. 4 *Co.* 87.

(4) And where the mode of election is not preſcribed by the charter, or eſtabliſhed by immemorial uſage, it may be regulated by a by-law. 3 *T. R.* 189. When the electors are deſcribed in the charter, their number, in order to avoid riot and confuſion, may be reſtrained by a by-law; but a by-law cannot ſtrike off an integral part, neither can it narrow the number of perſons out of whom

2. To ſue or be ſued, implead or be impleaded, grant or receive, by it's corporate name, and do all other acts as natural perſons may. 3. To purchaſe lands, and hold them, for the benefit of themſelves and their ſucceſſors; which two are conſequential to the former (5). 4. To have a common ſeal. For a corporation, being an inviſible body, cannot manifeſt it's intentions by any perſonal act or oral diſcourſe: it therefore acts and ſpeaks only by it's common ſeal. For, though the particular members may expreſs their private conſents to any act, by words, or ſigning their names, yet this does not bind the corporation: it is the fixing of the ſeal, and that only, which unites the ſeveral aſſents of the individuals, who compoſe the community, and makes one joint aſſent of the whole [b]. 5. To make by-laws or private ſtatutes for the better govern-
[476] ment of the corporation; which are binding upon themſelves, unleſs contrary to the laws of the land, and then they are void. This is alſo included by law in the very act of incorporation [c]: for, as natural reaſon is given to the natural body for the governing it, ſo by-laws or ſtatutes are a ſort of political reaſon to govern the body politic (6). And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome [d]. But no trading company is, with us, allowed to make by-laws, which may affect the king's prero-

[b] Dav. 44. 48.
[c] Hob. 211.
[d] *Sodales legem quam volent, dum ne quid ex publica lege corrumpant, ſibi ferunto.*

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the election is to be made. 3 *Burr.* 1833. But the number of the electors of members of parliament cannot be diminiſhed by a by-law. 4 *Inſt.* 48.

(5) All corporations muſt have a licence from the king to enable them to purchaſe and hold lands in mortmain. *Co. Litt.* 2. 7 & 8 *W.* III. *c.* 37.

(6) Where the power of making by-laws is in the body at large, they may delegate their right to a ſelect body, who thus become the repreſentative of the whole community. *Ld. Mansfield*, 3 *Burr.* 1837.

gative,

gative, or the common profit of the people, under penalty of 40*l.* unleſs they be approved by the chancellor, treaſurer, and chief juſtices, or the judges of aſſiſe in their circuits: and, even though they be ſo approved, ſtill, if contrary to law, they are void[e]. Theſe five powers are inſeparably incident to every corporation, at leaſt to every corporation *aggregate*: for two of them, though they may be practiſed, yet are very unneceſſary to a corporation *ſole*; *viz.* to have a corporate ſeal to teſtify his ſole aſſent, and to make ſtatutes for the regulation of his own conduct.

THERE are alſo certain privileges and diſabilities that attend an aggregate corporation, and are not applicable to ſuch as are ſole; the reaſon of them ceaſing, and of courſe the law. It muſt always appear by attorney; for it cannot appear in perſon, being, as ſir Edward Coke ſays[f], inviſible, and exiſting only in intendment and conſideration of law. It can neither maintain, or be made defendant to, an action of battery or ſuch like perſonal injuries: for a corporation can neither beat nor be beaten, in it's body politic[g]. A corporation cannot commit treaſon, or felony, or other crime, in it's corporate capacity[h]: though it's members may, in their diſtinct individual capacities[i]. Neither is it capable of ſuffering a traitor's or felon's puniſhment, for it is not liable to [477] corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or adminiſtrator, or perform any perſonal duties; for it cannot take an oath for the due execution of the office. It cannot be ſeiſed of lands to the uſe of another[j]; for ſuch kind of confidence is foreign to the end of it's inſtitution. Neither can it be committed to priſon[k]: for it's exiſtence being ideal, no man can apprehend or arreſt it. And therefore alſo it cannot be outlawed; for outlawry always ſuppoſes a precedent right of arreſting, which

[e] Stat. 19 Hen. VII. c. 7. 11 Rep. 54.
[f] 10 Rep. 32.
[g] Bro. *Abr. tit. Corporation.* 63.
[h] 10 Rep. 32.
[i] The civil law alſo ordains that, for the miſbehaviour of a body corporate, the directors only ſhall be anſwerable in their perſonal capacities. *Ff.* 4. 3. 15.
[j] Bro. *Abr. tit. Feoffm. al. uſe.* 40. Bacon of uſes. 347.
[k] Plowd. 538.

has been defeated by the parties abſconding, and that alſo a corporation cannot do: for which reaſons the proceedings to compel a corporation to appear to any ſuit by attorney are always by diſtreſs on their lands and goods[l]. Neither can a corporation be excommunicated: for it has no ſoul, as is gravely obſerved by ſir Edward Coke[m]: and therefore alſo it is not liable to be ſummoned into the eccleſiaſtical courts upon any account; for thoſe courts act only *pro ſalute animae*, and their ſentences can only be inforced by ſpiritual cenſures: a conſideration, which, carried to it's full extent, would alone demonſtrate the impropriety of theſe courts interfering in any temporal rights whatſoever.

THERE are alſo other incidents and powers, which belong to ſome ſort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themſelves and their ſucceſſors, but a ſole corporation cannot[n]: for ſuch moveable property is liable to be loſt or imbezzled, and would raiſe a multitude of diſputes between the ſucceſſor and executor; which the law is careful to avoid (7). In eccleſiaſtical and eleemoſynary foundations, the king or the founder may give them rules, laws, ſtatutes, and ordinances, which they are bound to obſerve: but corporations merely
[478] lay, conſtituted for civil purpoſes, are ſubject to no particular ſtatutes (8); but to the common law, and to their own by-laws, not contrary to the laws of the realm[o]. Aggregate corporations alſo, that have by their conſtitution a head, as a dean, warden, maſter, or the like, cannot do any acts during the vacancy of the headſhip, except only appointing

[l] Bro. *Abr. tit. Corporation.* 11. *Outlawry.* 72.
[m] 10 Rep. 32.
[n] Co. Litt. 46.
[o] Lord Raym. 8.

(7) Mr. Hargrave conſiders the jewels of the crown rather as heir-looms, than an inſtance of chattels paſſing in ſucceſſion in a ſole corporation. *Co. Litt.* 9. n. 1.

(8) Their charters or immemorial uſages, which are equivalent to the expreſs proviſions of a charter, are in fact their ſtatutes.

another:

another: neither are they then capable of receiving a grant; for ſuch corporation is incomplete without a head[p]. But there may be a corporation aggregate conſtituted without a head[q]: as the collegiate church of Southwell in Nottinghamſhire, which conſiſts only of prebendaries; and the governors of the charter-houſe, London, who have no preſident or ſuperior, but are all of equal authority. In aggregate corporations alſo, the act of the major part is eſteemed the act of the whole[r]. By the civil law this major part muſt have conſiſted of two thirds of the whole; elſe no act could be performed[s]: which perhaps may be one reaſon why they required three at leaſt to make a corporation. But, with us, *any* majority is ſufficient to determine the act of the whole body. And whereas, notwithſtanding the law ſtood thus, ſome founders of corporations had made ſtatutes in derogation of the common law, making very frequently the unanimous aſſent of the ſociety to be neceſſary to any corporate act; (which king Henry VIII found to be a great obſtruction to his projected ſcheme of obtaining a ſurrender of the lands of eccleſiaſtical corporations,) it was therefore enacted by ſtatute 33 Hen. VIII. c. 27. that all private ſtatutes ſhall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obſtructed by any one or more, being the minority: but this ſtatute extends not to any negative or neceſſary voice, given by the founder to the head of any ſuch ſociety (9).

[p] Co. Litt. 263, 264.
[q] 10 Rep. 30.
[r] Bro. *Abr. tit. Corporation.* 31. 34.
[s] *Ff.* 3. 4. 3.

(9) This act clearly vacates all private ſtatutes, both prior and ſubſequent to its date, which require the concurrence of more than a majority to give validity to any grant or election. The learned Judge is of opinion, that it has not affected the negative given by the ſtatutes to the head of any ſociety; but I am inclined to think this opinion may be queſtioned; eſpecially in caſes where, in the firſt inſtance, he gives his vote with the members of the ſociety. It is the uſual language of college ſtatutes to direct that many acts ſhall be done by *gardianus & major pars ſociorum*, or *magiſter*, or *præpoſitus*

We before obſerved that it was incident to every corporation, to have a capacity to purchaſe lands for themſelves and
[479] ſucceſſors: and this is regularly true at the common law [t]. But they are excepted out of the ſtatute of wills [u]: ſo that no deviſe of lands to a corporation by will is good: except for charitable uſes, by ſtatute 43 Eliz. c. 4. [w]: which exception is again greatly narrowed by the ſtatute 9 Geo. II. c. 36. And alſo, by a great variety of ſtatutes [x], their privilege even of purchaſing from any living grantor is much abridged: ſo that now a corporation, either eccleſiaſtical or lay, muſt have a licence from the king to purchaſe [y]; before they can exert that capacity which is veſted in them by the common law: nor is even this in all caſes ſufficient. Theſe ſtatutes are generally called the ſtatutes of *mortmain*: all purchaſes made by corporate bodies being ſaid to be purchaſes in *mortmain*, *in mortua manu*: for the reaſon of which appellation ſir Edward Coke [z] offers many conjectures; but there is one which ſeems more probable than any that he has given us: *viz.* that theſe purchaſes being uſually made by eccleſiaſtical bodies, the members of which (being profeſſed) were reckoned dead perſons in law, land therefore, holden by them, might with great propriety be ſaid to be held *in mortua manu* (10).

[t] 10 Rep. 30.

[u] 34 Hen. VIII. c. 5.

[w] Hob. 136.

[x] From *magna carta*, 9 Hen. III. c. 36. to 9 Geo. II. c. 36.

[y] By the civil law a corporation was incapable of taking lands, unleſs by ſpecial privilege from the emperor: *collegium, ſi nullo ſpeciali privilegio ſubnixum ſit, hæreditatem capere non poſſe, dubium non eſt.* Cod. 6. 24. 8.

[z] 1 Inſt. 2.

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tus et major pars; and it has been determined by the court of king's bench, (*Comyn.* 377.) and by the viſitor of Clare-hall, Cambridge, and alſo by the viſitors of Dublin college, that this expreſſion does not confer upon the warden, maſter, or provoſt, any negative; but that his vote muſt be counted with the reſt, and that he is concluded by a majority of votes againſt him.

(10) If I might add another conjecture upon the origin of this word, I ſhould ſay that lands held by a corporation, on account of the perpetuity of ſucceſſion, did not yield to the lord the great feudal fruits of relief, wardſhip, and marriage; and for that reaſon they might be ſaid to be held in a dead or unproductive hand.

I SHALL

I SHALL defer the more particular expoſition of theſe ſtatutes of mortmain till the next book of theſe commentaries, when we ſhall conſider the nature and tenures of eſtates; and alſo the expoſition of thoſe diſabling ſtatutes of queen Elizabeth, which reſtrain ſpiritual and eleemoſynary corporations from aliening ſuch lands as they are at preſent in legal poſſeſſion of; only mentioning them in this place, for the ſake of regularity, as ſtatutable incapacities incident and relative to corporations,

THE general *duties* of all bodies politic, conſidered in their corporate capacity, may, like thoſe of natural perſons, be reduced to this ſingle one: that of acting up to the end [480] or deſign, whatever it be, for which they were created by their founder.

III. I PROCEED therefore next to inquire, how theſe corporations may be *viſited*. For corporations being compoſed of individuals, ſubject to human frailties, are liable, as well as private perſons, to deviate from the end of their inſtitution. And for that reaſon the law has provided proper perſons to viſit, inquire into, and correct all irregularities that ariſe in ſuch corporations, either ſole or aggregate, and whether eccleſiaſtical, civil, or eleemoſynary. With regard to all eccleſiaſtical corporations, the ordinary is their viſitor, ſo conſtituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as ſupreme ordinary, is the viſitor of the archbiſhop or metropolitan; the metropolitan has the charge and coercion of all his ſuffragan biſhops; and the biſhops in their ſeveral dioceſes are in eccleſiaſtical matters the viſitors of all deans and chapters, of all parſons and vicars, and all other ſpiritual corporations. With reſpect to all lay corporations, the founder, his heirs, or aſſigns, are the viſitors, whether the foundation be civil or eleemoſynary; for in a lay incorporation the ordinary neither can nor ought to viſit [p].

[p] 10 Rep. 32.

I KNOW

I KNOW it is generally ſaid, that civil corporations are ſubject to no viſitation, but merely to the common law of the land; and this ſhall be preſently explained. But firſt, as I have laid it down as a rule that the founder, his heirs, or aſſigns, are the viſitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations in the ſtricteſt and original ſenſe is the king alone, for he only can incorporate a ſociety; and in civil incorporations, ſuch as mayor and commonalty, &c. where there are no poſſeſſions or endowments given to the body, there is no other founder but the king: but in eleemoſynary foundations, ſuch as colleges and hoſpitals, where there is an endowment of lands, the law diſtinguiſhes, and makes two ſpecies of foun-
[481] dation; the one *fundatio incipiens*, or the incorporation, in which ſenſe the king is the general founder of all colleges and hoſpitals; the other *fundatio perficiens*, or the dotation of it, in which ſenſe the firſt gift of the revenue is the foundation, and he who gives them is in law the founder: and it is in this laſt ſenſe that we generally call a man the founder of a college or hoſpital [b]. But here the king has his prerogative: for, if the king and a private man join in endowing an eleemoſynary foundation, the king alone ſhall be the founder of it. And, in general, the king being the ſole founder of all civil corporations, and the endower the perficient founder of all eleemoſynary ones, the right of viſitation of the former reſults, according to the rule laid down, to the king; and of the latter to the patron or endower.

THE king being thus conſtituted by law viſitor of all civil corporations, the law has alſo appointed the place, wherein he ſhall exerciſe this juriſdiction: which is the court of king's bench; where, and where only, all miſbehaviours of this kind of corporations are inquired into and redreſſed, and all their controverſies decided. And this is what I underſtand to be the meaning of our lawyers, when they ſay that theſe civil corporations are liable to no viſitation; that

[b] 10 Rep. 33.

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is, that the law having by immemorial uſage appointed them to be viſited and inſpected by the king their founder, in his majeſty's court of king's bench, according to the rules of the common law, they ought not to be viſited elſewhere, or by any other authority [c]. And this is ſo ſtrictly true, that though the king by his letters patent had ſubjected the college of phyſicians to the viſitation of four very reſpectable perſons, the lord chancellor, the two chief juſtices, and the chief baron; though the college had accepted this charter with all poſſible marks of acquieſcence, and had acted under it for near a century; yet in 1753, the authority of this proviſion coming in diſpute, on an appeal preferred to theſe ſuppoſed viſitors, they directed the legality of their own appointment [482] to be argued: and, as this college was merely a civil and not an eleemoſynary foundation, they at length determined, upon ſeveral days ſolemn debate, that they had no juriſdiction as viſitors; and remitted the appellant (if aggrieved) to his regular remedy in his majeſty's court of king's bench.

As to eleemoſynary corporations, by the dotation the founder and his heirs are of common right the legal viſitors, to ſee that ſuch property is rightly employed, as might otherwiſe have deſcended to the viſitor himſelf: but, if the founder has appointed and aſſigned any other perſon to be viſitor, then his aſſignee ſo appointed is inveſted with all the founder's

[c] This notion is perhaps too refined. The court of king's bench, (it may be ſaid) from it's general ſuperintendent authority where other juriſdictions are deficient, has power to regulate all corporations where no ſpecial viſitor is appointed. But not in the light of viſitor: for as it's judgments are liable to be reverſed by writs of error, it may be thought to want one of the eſſential marks of viſitatorial power (11).

(11) And it wants, I conceive, another mark of viſitatorial power; which is, the diſcretion of a viſitor, voluntarily to regulate and ſuperintend. The court of king's bench, upon a proper complaint and application, can prevent and puniſh injuſtice in civil corporations, as in every other part of their juriſdiction; but it is not the language of the profeſſion to call that part of their authority a viſitatorial power.

power, in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the universities. These were all of them considered, by the popish clergy, as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held[d], that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1. which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5. which directs the bishop to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5. are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit[e].

COLLEGES in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the
[483] diocese. This is evident, because in many of our most antient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bulle to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprized, has immemorially exercised visitatorial authority (12); which can be ascribed to nothing else, but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is

[d] Yearbook, 8 Edw. III. 28. 8 Ass. 29. [e] 2 Inst. 725.

(12) That is, the bishop of Lincoln, from whose diocese that of Oxford was taken.

not impoſſible, that the number of colleges in Cambridge, which are viſited by the biſhop of Ely, may in part be derived from the ſame original (13).

BUT, whatever might be formerly the opinion of the clergy, it is now held as eſtabliſhed common law, that colleges are lay corporations, though ſometimes totally compoſed of eccleſiaſtical perſons; and that the right of viſitation does not ariſe from any principles of the canon law, but of neceſſity was created by the common law[f]. And yet the power and juriſdiction of viſitors in colleges was left ſo much in the dark at common law, that the whole doctrine was very unſettled till the famous caſe of *Philips and Bury*[g]. In this the main queſtion was, whether the ſentence of the biſhop of Exeter, who (as viſitor) had deprived doctor Bury the rector of Exeter college, could be examined and redreſſed by the court of king's bench. And the three puiſne judges were of opinion, that it might be reviewed, for that the viſitor's juriſdiction could not exclude the common law; and accordingly judgment was given in that court. But the lord chief juſtice Holt was of a contrary opinion; and held, that by the common law the office of viſitor is to judge according to the ſtatutes of the college, and to expel and deprive upon juſt occaſions, and to hear all appeals of courſe: and that from him, and him only, the party grieved ought to have redreſs: the founder having repoſed in him ſo entire a confidence, that he will adminiſter juſtice impartially, that his determinations are final, and examinable in no other court whatſoever. And, upon this, a writ of error being brought into the houſe of lords, they concurred in ſir John Holt's opinion, and reverſed the judgment of the court of king's bench. To which lead- [484]

[f] Lord Raym. 8. Show. 35. Skinn. 407. Salk. 403.
[g] Lord Raym. 5. 4 Mod. 106. Carthew, 180.

(13) In the univerſity of Cambridge, I am inclined to think, that the biſhop of Ely has no viſitatorial authority from preſcription; but that in every inſtance, in which he is viſitor, he is appointed by the expreſs declaration and ſpecial proviſion of the founder. He, without doubt, was fixed upon from the dignity of his ſtation and the proximity of his reſidence.

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ing caſe all ſubſequent determinations have been conformable. But, where the viſitor is under a temporary diſability, there the court of king's bench will interpoſe, to prevent a defect of juſtice[h]. Alſo it is ſaid[i], that if a founder of an eleemoſynary foundation appoints a viſitor, and limits his juriſdiction by rules and ſtatutes, if the viſitor in his ſentence exceeds thoſe rules, an action lies againſt him; but it is otherwiſe, where he miſtakes in a thing within his power(14).

IV. WE come now, in the laſt place, to conſider how corporations may be diſſolved. Any particular member may be diſfranchiſed, or loſe his place in the corporation, by acting contrary to the laws of the ſociety, or the laws of the land: or he may reſign it by his own voluntary act[k]. But

[h] Stra. 797.
[i] 2 Lutw. 1566.
[k] 11 Rep. 98.

(14) No particular form of words is neceſſary for the appointment of a viſitor. *Sit viſitator*, or *viſitationem commendamus*, will create a general viſitor, and confer all the authority incidental to the office; (1 *Burr.* 199.) but this general power may be reſtrained and qualified, or the viſitor may be directed by the ſtatute to do particular acts, in which inſtances he has no diſcretion as viſitor: as where the ſtatutes direct the viſitor to appoint one of two perſons, nominated by the fellows, the maſter of a college; the court of king's bench will examine the nomination of the fellows, and if correct, will compel the viſitor to appoint one of the two. 2 *T. R.* 290. New ingrafted fellowſhips, if no ſtatutes are given by the founders of them, muſt follow the original foundation, and are ſubject to the ſame diſcipline and judicature. 1 *Burr.* 203. It is the duty of the viſitor, in every inſtance, to effectuate the intention of the founder, as far as he can collect it from the ſtatutes and the nature of the inſtitution; and in the exerciſe of this juriſdiction he is free from all control. Lord Mansfield has declared, that "the viſitatorial "power, if properly exerciſed, without expence or delay, is uſeful "to and convenient to colleges; and it is now ſettled and eſta- "bliſhed, that the juriſdiction of a viſitor is ſummary, and without "appeal from it." 1 *Burr.* 200. It has been determined, that, where the founder of a college or eleemoſynary corporation has appointed no ſpecial viſitor, if his heirs become extinct, or if they cannot be found, the right of viſitation devolves to the king, to be exerciſed by the chancellor in the ſame manner, as where the king himſelf is the founder. 4 *T. R.* 233. 2 *Veſ. jun.* 609.

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the body politic may alſo itſelf be diſſolved in ſeveral ways; which diſſolution is the civil death of the corporation: and in this caſe their lands and tenements ſhall revert to the perſon, or his heirs, who granted them to the corporation: for the law doth annex a condition to every ſuch grant, that if the corporation be diſſolved, the grantor ſhall have the lands again, becauſe the cauſe of the grant faileth [l]. The grant is indeed only during the life of the corporation; which *may* endure for ever: but, when that life is determined by the diſſolution of the body politic, the grantor takes it back by reverſion, as in the caſe of every other grant for life. The debts of a corporation, either to or from it, are totally extinguiſhed by it's diſſolution; ſo that the members thereof cannot recover, or be charged with them, in their natural capacities [m]: agreeable to that maxim of the civil law [n], "*ſi quid univerſitati debetur, ſingulis non debetur; nec, quod debet univerſitas, ſinguli debent.*"

A CORPORATION may be diſſolved, 1. By act of parliament, [485] which is boundleſs in it's operations. 2. By the natural death of all it's members, in caſe of an aggregate corporation. 3. By ſurrender of it's franchiſes into the hands of the king, which is a kind of ſuicide. 4. By forfeiture of it's charter, through negligence or abuſe of it's franchiſes; in which caſe the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular courſe is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exerciſe their corporate power, having forfeited it by ſuch and ſuch proceedings. The exertion of this act of law, for the purpoſes of the ſtate in the reigns of king Charles and king James the ſecond, particularly by ſeizing the charter of the city of London, gave great and juſt offence; though perhaps, in ſtrictneſs of law, the proceedings in moſt of them were ſufficiently regular: but the judgment againſt that of London was re-

[l] Co. Litt. 13.
[m] 1 Lev. 237.
[n] *Ff.* 3. 4. 7.

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verſed by act of parliament [o] after the revolution; and by the ſame ſtatute it is enacted, that the franchiſes of the city of London ſhall never more be forfeited for any cauſe whatſoever. And, becauſe by the common law corporations were diſſolved, in caſe the mayor or head officer was not duly elected on the day appointed in the charter or eſtabliſhed by preſcription, it is now provided [p], that for the future no corporation ſhall be diſſolved upon that account; and ample directions are given for appointing a new officer, in caſe there be no election, or a void one, made upon the preſcriptive or charter day.

[o] Stat. 2 W. & M. c. 8. [p] Stat. 11 Geo. I. c. 4.

THE END OF THE FIRST BOOK.

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